Petition

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ALEXANDER L. STEVAS,

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLEMAN A. YOUNG, Individually and as Mayor, CITY OF DETROIT, and CITY OF DETROIT, a Municipal Corporation,
Petitioners,

v.

MALCOM BALDRIDGE, Secretary of Commerce of the United States, and BRUCE CHAPMAN, Director, Bureau of the Census,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the District Court found after trial that a required adjustment in the official population count of the 1980 decennial census for the admitted undercounting of Blacks and Hispanics will effectively prevent any dilution of the plaintiff's right to equal representation and equal weight of vote in the United States House of Representatives, did the Court of Appeals err in holding that the plaintiff had no standing to challenge as unconstitutional the refusal of the Census Bureau to adjust for the undercount.

2. Under Art. I, § 2, cl. 3 of the Constitution, in determining the population base for Congressional redistricting, must the states utilize Census Bureau certified figures or may each state on its own make adjustments or make an independent determination of population?

3. Whether Art. I, Sec. 2, cl. 3 of the Constitution requires that the official population count of the 1980 decennial census be adjusted for the admitted undercounting of Blacks and Hispanics during the taking of the decennial census?

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MALCOM BALDRIDGE, Secretary of Commerce of the United States, and BRUCE CHAPMAN, Director, Bureau of the Census,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 15, 1981, petition for rehearing denied on September 22, 1981.

PRIOR OPINIONS

The opinion of the Court of Appeals is reported at 652 F.2d 617 (6th Cir. 1981) and is printed in the Appendix at page 1. The opinion of the District Court finding in favor of the plaintiffs is reported at 497 F. Supp. 1318 (E.D. Mich. 1980) and is printed in the Appendix at page 76.

The opinion of the District Court overruling the defendants' motion to dismiss is not reported and is printed in the Appendix at page 56.

JURISDICTION

The judgment of the Court of Appeals was entered on June 15, 1981, (App. 192) The petition for rehearing was denied on September 22, 1981 (App. 148). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved in this case are Art. I, § 2, Art. II, § 1, Amend. XIV, § 2 and Amend. XV, § 1. The statutes involved are 13 U.S.C. § 141 (a) - (d). Because these provisions are lengthy, they are set forth in the Appendix at pages i through iv.

STATEMENT OF THE CASE

This case is an effort to remedy the well-documented and long-standing problem of large numbers of minorities not being counted during the taking of the decennial census. In every past decennial census, according to scientifically valid evaluations conducted by the Census Bureau, there has been a "census undercount." The total number of persons counted during the taking of the decennial census has been less than the estimated population of the United States as of the census date.[1] The most prominent feature of the

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[1] In the 1970 decennial census, some 5.3 million persons or approximately 2.5% of the total population of the United States were not counted. (App. 77)

census undercount has been the *disparate undercounting* of racial minorities. In every past decennial census, the Census Bureau has determined that Blacks have been undercounted at a rate four or more times greater than the rate of which Whites have been undercounted.[2]

In the 1970 and 1960 decennial censuses, Blacks were undercounted at a rate four times that of Whites. In the 1970 decennial census, the national undercount rate for Blacks was 7.7% compared to a rate of 1.9% for Whites. In the 1960 decennial census the rates were 8.0% and 2.0% respectively. (App. 90-92) Preliminary studies for the 1980 decennial census indicate that there will again be a substantial undercount of Blacks. These studies estimate that the national undercount rate for Blacks will be between 4.5% and 5.5% (App. 11) which is between 2-1/2 and 3 times the White undercount rate for *1970*. While the Black undercount rate for 1980 is a reduction from the Black undercount rate for 1970, the Census Bureau has also indicated that there has been a corresponding reduction in the White undercount rate for 1980 over that for 1970. Although the Census Bureau has not at the present time provided plaintiffs with the White undercount rate for 1980, it is highly likely that the Black *differential undercount* in 1980 will be the same or greater than the differential undercount in past decennial censuses. As to the Hispanic undercount, it was *stipulated* by the defendants at trial that in the taking of the 1980 decennial census, Hispanics, as well as Blacks, will be disparately undercounted in relation to Whites. (App. 182-3)[3]

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[2] The methods by which the Census Bureau has evaluated and measured the census undercount, and in particular the Black differential undercount, were set forth fully in the opinion of the District Court (App. 77-79)

[3] Preliminary studies indicating the Hispanic undercount rate for 1980 presumably have been completed by the Census Bureau, but have

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The District Court found that scientifically valid methods are available by which the Black and Hispanic differential undercount in the 1980 decennial census can be measured and by which the population count can be adjusted to correct for the Black and Hispanic differential undercount. The District Court also found that an official population count scientifically adjusted for the Black and Hispanic differential undercount pursuant to these methods would be "more accurate than the raw enumeration of the Census Bureau." (App. 101)[4] The present case raises the issue of whether the Constitution of the United States requires that such an adjustment be made.

The substantive theory of the plaintiffs' constitutional claim is that such an adjustment is required by Art. I, § 2, cl. 3, in order to insure that in the Congressional redistricting following the 1980 decennial census there will in fact be equal representation for equal numbers of people in the United States House of Representatives. As the defendants stipulated, there was a Black and Hispanic differential undercount in the taking of the 1980 decennial census. As the 1980 census figures clearly show, the Black and Hispanic populations are concentrated in certain large cities such as Detroit. It follows, as has occurred in past censuses, that the cities

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not yet been made available. The Census Bureau has stated that there has been a Hispanic differential undercount in the 1970 decennial census, but the Bureau did not undertake to measure the extent of the Hispanic differential undercount in that census.

[4] The decennial census has never been a "simple headcount of the population." In past decennial censuses, the Census Bureau has adjusted the "headcount" figures by statistical methods in order to arrive at more accurate population totals. In the 1970 decennial census, for example, the Census Bureau added 4.9 million uncounted persons to the official count by the adjustment technique known as "imputation." (App. 94-96).

where the Black and Hispanic populations are concentrated will be disparately undercounted in relation to the rest of the state, where there is little or no Black or Hispanic population.

When Congressional redistricting is carried out with unadjusted official population figures, the residents of those cities and any other areas of the state having a heavy concentration of Black or Hispanic population will receive less representation and less weight of vote in the United States House of Representatives than do the residents of the rest of the state. In the 1980 Congressional redistricting within Michigan and the other states having cities or geographical locations with a large Black or Hispanic population, there will not in fact be equal representation for equal numbers of people in the United States House of Representatives.

As the District Court found, scientifically valid methods are available to measure and adjust for the Black and Hispanic differential undercount and to produce an official population count which is, on balance, more accurate than one derived only from the raw, unadjusted census data (App. 101). Therefore, plaintiffs submit that Art. I, § 2, cl. 3 imposes on the Census Bureau the affirmative obligation to adjust the official population count of the 1980 decennial census for the admitted and measureable Black and Hispanic differential undercount.

The plaintiffs in this action are Coleman A. Young, individually and as Mayor of the City of Detroit, and the City of Detroit. The defendants are Malcom Baldridge, Secretary of Commerce of the United States, and Bruce Chapman, Director, Bureau of the Census.[5] The suit was

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[5] Pursuant to Supreme Court Rule 40, the incumbents have been substituted for their predecessors, defendants in the action below.

filed in the United States District Court for the Eastern District of Michigan on April 2, 1980. The defendants immediately filed a motion to dismiss, raising various justiciability objections and disputing the legal sufficiency of the plaintiffs' substantive claim.

The motion to dismiss was denied by the District Court on May 29, 1980. (App 56 and 75) The District Court found standing on the part of Coleman A. Young as a resident and registered voter of the City of Detroit, to challenge as unconstitutional the submission by the Census Bureau of an official population count that was not adjusted for the Black and Hispanic differential undercount.[6] (App. 59-66) The District Court's basis for finding standing was that the submission of an unadjusted population count, and the resulting Congressional redistricting in Michigan pursuant to such a count, would cause injury in fact to the plaintiff's right to equal representation and equal weight of vote in the United States House of Representatives. The District Court rejected the defendants' other justiciability arguments and also held that the plaintiffs had stated a claim on which relief could be granted. (App. 55-66)

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[6] Because the District Court felt that the standing of the plaintiff Young was clearly established, it did not consider independently the standing of the City of Detroit. The standing of the City of Detroit was premised on the fact that a substantial number of federal and state funding programs allocate funds according to the City's population derived from the official population count of the decennial census and that the disparate undercounting of the City's residents deprives it of funds that it would otherwise be entitled to receive by law. (App. 152, 156, 161 and 164-6) The standing of a city to challenge the validity of Census Bureau practices on this basis has been recognized by other courts. See *Carey* v. *Klutznick*, 637 F.2d 834 (2d Cir. 1980); City of *Camden* v. *Plotkin*, 466 F.Supp. 44 (D.N.J. 1978). In the present case, the Court of Appeals after holding that the plaintiff Young lacked standing, ordered dismissal of the suit and did not consider whether the suit could be maintained by the City of Detroit.

Trial of the case commenced before the District Court on August 18, 1980. The defendants stipulated that there would be a Black and Hispanic differential undercount in the taking of the 1980 decennial census. (App. 182-3) The defendants' sole factual defense at the trial was a claimed inability of the Census Bureau to come up with a scientifically valid adjustment for the Black and Hispanic differential undercount within the statutory deadlines for the submission of the state and sub-state totals, December 31, 1980, and April 1, 1981, respectively.[7]

At the trial, both sides presented extensive evidence concerning the feasibility of an adjustment for the Black and Hispanic differential undercount. The testimony of the plaintiffs' expert witnesses and the testimony of the officials of the Census Bureau were not in conflict except in regard to the question of whether a "statistically defensible" adjustment could be made within the statutory deadlines. The District Court based its findings as to the feasibility of an adjustment for the Black and Hispanic differential undercount on the points of agreement between the plaintiffs' expert witnesses and the officials of the Census Bureau. (App. 96-101)

On September 25, 1980, the District Court issued its opinion. It again rejected the defendants' justiciability

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[7] The defendants never denied that an adjustment could be carried out if the Census Bureau were given a reasonable time to measure and adjust for the differential undercount beyond the statutory deadlines. Nor did the defendants ever contend that such an adjustment would not lead to an official population count that, on balance, would be more accurate than one based only on the raw, unadjusted census data.

The plaintiffs argued that the defendants' factual defense at trial was legally insufficient, since the statutory deadlines were discretionary and the District Court could allow the Census Bureau additional time to develop a "more accurate" adjusted population count.

arguments (App. 80-85) and held that the constitutional principle of equal representation for equal numbers of people in the United States House of Representatives mandated that the official population count of the 1980 decennial census be adjusted for the Black and Hispanic differential undercount. (App. 102-113) It specifically found as a fact that an official population count, adjusted for the Black and Hispanic differential undercount according to the presently available scientific methods would, on balance, be more accurate than an official population count based only on the raw, unadjusted census data. (App. 101)

The District Court also held that it was not necessary to resolve the question of whether such an adjustment could be carried out within the statutory deadlines. The District Court concluded that those deadlines were discretionary and if it was not possible for the Census Bureau to complete the adjustment process within those deadlines, the Court could grant the Bureau a reasonable extension of time. (App. 115-118)

The District Court in its September 30, 1980, Judgment (App. 120-21) ordered the defendants to adjust the official population count of the 1980 decennial census to reflect the Black and Hispanic differential undercount and to report to the Court within 30 days the precise nature of the Census Bureau's plan to implement the Court's judgment. The Court directed that the methods by which the adjustment would be made would remain within the discretion of the Census Bureau so long as those methods were "statistically defensible." The Court also enjoined the defendants so as to prevent the Census Bureau from issuing an official population count that was not adjusted for the Black and Hispanic differential undercount.

Following further proceedings not relevant here,[8] and following a December 15, 1980, hearing the District Court entered an order approving the Bureau's plan to implement the Court's judgment, which had been agreed to by the plaintiffs. As part of that order, the Court also extended the dates for reporting the state and sub-state population totals to September 30, 1981, and November 30, 1981, respectively. (App. 137-144).

On December 24, 1980, Justice Stewart entered an Order staying the judgment of the District Court pending the determination of the appeal by the Court of Appeals. (App. 147)

On June 15, 1981, the Court of Appeals, in a 2-1 decision, reversed the judgment of the District Court, on the ground that the plaintiff Young lacked standing to raise a constitutional challenge to the refusal of the Census Bureau to adjust the official population count of the 1980 decennial census for the admitted Black and Hispanic differential undercount. The Court of Appeals did not dispute that Congressional redistricting in Michigan made with unadjusted population figures

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[8] In its Report in response to the Court's judgment, filed on October 27, 1980, the Census Bureau contended that the presently-available methods for the measurement and adjustment of the Black and Hispanic differential undercount did not meet the Bureau's criteria of "statistical defensibility," and argued that they could not be compelled to adjust for the differential undercount pursuant to those methods regardless of whether such an adjustment would lead to a more accurate official population count than one based only on the raw, unadjusted census data. At the same time the defendants filed a motion for a new trial, or in the alternative, for relief from judgment on this basis. The District Court held that the post-trial motion was legally insufficient and overruled it. (App. 122-135). The Census Bureau was then given another opportunity to present a plan to implement the Court's judgment. (App. 135). The defendants did not contend on appeal that the District Court erred in overruling their post-trial motion.

would not cause injury in fact to the plaintiff Young's right to equal representation and equal weight of vote in the United States House of Representatives. (App. 14-18) Rather, it held that the refusal of the Census Bureau to submit adjusted population figures was not the "legal cause" of the plaintiff's injury. On that basis, the Court of Appeals denied plaintiffs' standing to seek judicial relief. (App. 14-18)

There were two components to the holding of the Court of Appeals on the matter of "legal cause." First, the Court of Appeals held that the Michigan legislature was not constitutionally required to use the federally-certified official population count of the decennial census as the population base for Congressional redistricting within the State of Michigan. (App. 17) Second, the Court of Appeals held that since the Michigan legislature was constitutionally permitted to disregard the federally-certified official population count of the decennial census in Congressional redistricting, the Michigan legislature was an "independent intervening actor," whose action in using the unadjusted data was the "legal cause" of the injury in fact to the plaintiff's right to equal representation and equal weight of vote in the United States House of Representatives. (App. 17)

The plaintiffs filed a petition for rehearing, with a suggestion of the appropriateness of a rehearing en banc, which was denied by the Court of Appeals on September 22, 1981. (App. 148)

REASONS FOR GRANTING THE WRIT

I.

THE "INDEPENDENT INTERVENING ACTOR" CONCEPT THAT WAS INVOKED BY THE COURT OF APPEALS TO DENY STANDING TO THE PLAINTIFF IN THE PRESENT CASE IS DEMONSTRABLY INCONSISTENT WITH THE INJURY IN FACT TEST OF CONSTITUTIONAL STANDING THAT HAS BEEN PROMULGATED BY THIS COURT.

As the Court of Appeals recognized, Congressional redistricting in Michigan pursuant to an official population count that is not adjusted for the Black and Hispanic differential undercount will cause injury in fact to the right of the plaintiff, Coleman A. Young, to equal representation and equal weight of vote in the United States House of Representatives.[9] Nonetheless, the Court of Appeals denied standing to the plaintiff Young on the ground that the refusal of the Census Bureau to submit an adjusted count was not the "legal cause" of the injury in fact suffered by the plaintiff. In so doing, the Court of Appeals invoked the concept of "independent intervening actor." This concept has no basis whatsoever in the controlling decisions of this Court.

The Court of Appeals held that the Michigan legislature was an "independent intervening actor," because the actual redistricting of Congressional seats

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[9] The City of Detroit has a Black population of over 60% and one of the larger concentrations of Hispanic population in the state. As a result, if Congressional redistricting within Michigan is based on an official population count that is not adjusted for the Black and Hispanic differential undercount, all residents and registered voters of the City of Detroit will suffer an inevitable dilution of the right to equal representation and equal weight of vote in the United States House of Representatives.

within the State of Michigan would have to be carried out by the Michigan legislature. In the Court of Appeals' view, the Michigan legislature is constitutionally permitted during Congressional redistricting to disregard the official decennial census population counts as furnished and certified by the Census Bureau. (App. 17-18) This view was based on the hypothetical or speculative possibility that the Michigan legislature could disregard official census figures by either modifying official census figures or substituting their own figures. The Court of Appeals found this speculative possibility to be a "break [in] the chain of causation." The potential of intervention by the Michigan Legislature between the alleged constitutional failure to adjust on the part of the Census Bureau and plaintiff's injury caused by the dimunition of his right of equal representation and equal weight of role was held to be the "legal cause" of plaintiff's injury in fact. (App. 18)[10]

This "independent intervening actor" concept that was invoked by the Court of Appeals to deny standing is demonstrably inconsistent with the injury in fact test of constitutional standing that has been promulgated by this Court.[11]

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[10] For purposes of the present argument, it is assumed that the Michigan legislature is not constitutionally required to use federally-certified census data for the Congressional redistricting that will follow the 1980 decennial census. This assumption, however, is erroneous as is vigorously contended in § II herein.

[11] The concept of "independent intervening actor" and the concept of "legal cause" are akin to concepts such as "legal injury" and "nexus," which have been rejected by this Court. See *Data Processing Service Organization* v. *Camp*, 397 U.S. 150 (1970); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978). This Court has developed a pragmatic approach to standing, designed to bring about a "reduction of the threshold requirement [of standing] to actual injury redressable by the Court." *Simon* v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 (1979).

The two components of the injury in fact test are: (1) an actual injury to the plaintiff and (2) an injury that is likely to be redressed by a favorable decision. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) So long as the injury complained of will be redressed by the granting of relief against the defendant who is before the court, the injury in fact to the plaintiff has been "caused" by the action of that defendant. Once this causal relationship has been shown, this Court has held that the plaintiff has standing to challenge the constitutionality of those actions.

As this Court has specifically stated: "Our recent cases have required no more than a showing that there is a *'substantial likelihood'* that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." *Duke Power Co.* v. *Carolina Environmental Group*, 438 U.S. 59, 75, n.20 (1978), (emphasis added). The injury in fact test then focuses entirely on the actions of the defendant who is before the court, and on whether granting the relief requested against that defendant will redress the claimed injury to the plaintiff. There is no concern with the actions of any other person, "intervening," "independent," or otherwise.

In referring to the above-quoted discussion in *Duke Power*, the Court of Appeals said that this language meant that, "when focusing on the question of a plaintiff's standing, the relevant considerations are the existence of an injury, its cause, and the existence of a remedy for redress of the injury." (App. 14) What the Court of Appeals has in effect done is to add a *third* component to the injury in fact test, by treating "cause" and "redressibility" as separate requirements. But this Court has made it abundantly clear that "cause" and "redressibility" are correlatives not separate requirements. Again, as it specifically stated in *Duke Power*: "The more difficult step in the standing inquiry is

establishing that these injuries 'fairly can be traced to the challenged action of the defendant,' *or put otherwise*, that the exercise of the Court's remedial powers would redress the claimed injuries." 438 U.S. at 74 (emphasis added and citations omitted). There are only two components to the injury in fact test — "injury" and "redressibility." Where the granting of relief against the defendant who is before the court will redress the claimed injury, the action of that defendant is the "cause" of the injury for standing purposes. When this requirement is met the party who suffers the claimed injuries has standing to challenge the constitutionality of that action.

The present case demonstrates most cogently why the "independent intervening actor" concept is patently inconsistent with the injury in fact test of constitutional standing that has been promulgated by this Court. *In the present case, the application of that concept has operated to deny standing to a plaintiff whose injury admittedly will be redressed by the granting of relief against the defendant who is before the court.* The Court of Appeals recognized that requiring the Census Bureau to submit an official population count that was adjusted for the Black and Hispanic differential undercount and enjoining the Census Bureau from submitting an official population count that was not so adjusted, as the District Court has ordered (app. 118-119) would redress the injury to the plaintiff's right to equal representation and equal weight of vote in the United States House of Representatives. (App. 15-18)

The Court of Appeals denied standing under the "independent intervening actor" concept only because of the speculative and hypothetical possibility that the Michigan legislature could *also* adjust for the Black and Hispanic differential undercount, and thereby *undo* the injury to the plaintiff's rights that would result from the

submission of an unadjusted population count by the Census Bureau.[12]

What the Court of Appeals completely ignored was that if the *only* official population count that the Census Bureau was permitted to furnish and certify was one that was adjusted for the Black and Hispanic differential undercount, there would be no need for the Michigan legislature to do anything. The Census Bureau's compliance with the Order of the District Court, without more, would redress the injury to the plaintiff's right to equal representation and equal weight of vote in the United States House of Representatives. Therefore, it is an absolute certainty — not merely a "substantial

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[12] In the present case, the possibility of "remedial action" on the part of the Michigan legislature is not only "speculative and hypothetical," but as revealed by the record, is completely non-existent.

There is no dispute that the Michigan legislature is required by the Michigan Constitution, 1963, Art. IV, §§ 2, 3 to use the official population count of the decennial census to apportion state legislative and senatorial districts and that it is required by statute, MCLA § 8.3v to use this federally-certified official population count for all other purposes. There is also no dispute that Michigan has always redistricted Congressional districts following the decennial census strictly in accordance with the Census Bureau's official population count of the decennial census. The defendants neither suggested nor proved at any stage of the litigation that the Michigan legislature had the disposition to use anything other than this official population count as the population base for the 1980 Congressional redistricting. The defendants introduced no evidence to the effect that the Michigan legislature had the scientific and technical capability to undertake the very complicated task of measuring and adjusting for the Black and Hispanic differential undercount in Michigan. Based on the record in this case, as Judge Keith pointed out in dissent, the only reasonable assumption that can be made is that the official population count of the 1980 decennial census, as furnished and certified by the Census Bureau, will in fact be used by the Michigan legislature for Congressional redistricting in Michigan following the 1980 decennial census. (App. 32-34)

likelihood" — that the granting of relief against the defendants who are before the court "will prevent or redress the claimed injury," *Duke Power* at 79. The speculative and hypothetical possibility that the Michigan legislature also might "prevent the anticipated harm" should be completely irrelevant to the standing inquiry. Because the "independent intervening actor" concept operates to deny standing in a case such as this, it is demonstrably inconsistent with the injury in fact test of constitutional standing that has been promulgated by this Court.

The Court of Appeals has thus "decided a federal question in a way in conflict with applicable decisions of this Court," necessitating the grant of certiorari so as to preserve the integrity of the law of standing that has been developed by this Court.[13]

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[13] The Court of Appeals also held that the case was not "ripe," on the grounds that the Michigan legislature "has not yet expressed its reaction to the census enumeration," and that the issues before the federal court will become more "specific" or "particularized" after the Michigan legislature acts. (App. 19-20) However, as revealed by the record in this case, there can be no doubt how the Michigan legislature will "express its reaction to the census enumeration." It will "express its reaction" by using the official population count of the 1980 decennial census, as furnished and certified by the Census Bureau, without modification, for Congressional redistricting within the state, as it has always done in the past. It is also impossible to see how the issues before the federal court will become more "specific" or "particularized" after the Michigan legislature acts. It is not disputed that because of the Black and Hispanic differential undercount and the large concentration of Black and Hispanic population in the City of Detroit, Congressional redistricting within the State of Michigan based on an unadjusted population count will not in fact provide equal representation and equal weight of vote in the United States House of Representatives to residents of the City of

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II.

WHETHER ART. I, § 2, CL. 3 OF THE CONSTITUTION MANDATES THAT THE POPULATION BASE FOR CONGRESSIONAL REDISTRICTING WITHIN A STATE FOLLOWING THE DECENNIAL CENSUS BE DETERMINED IN ACCORDANCE WITH FEDERALLY-CERTIFIED CENSUS FIGURES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN EXPRESSLY DECIDED BY THIS COURT.

The Court of Appeals' invocation and application of the concept of "independent intervening actor" to deny standing in the present case, was dependent upon its holding that it was constitutionally permissible for the Michigan legislature to disregard the federally-certified official population count of the decennial census as the population base for the intrastate Congressional redistricting. As demonstrated previously, the plaintiff's standing to challenge the refusal of the Census Bureau to adjust for the Black and Hispanic differential undercount is in no way affected by the question of whether or not the Michigan legislature is constitutionally required to

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Detroit. The constitutional question of whether the official population count used for Congressional redistricting must be adjusted for the Black and Hispanic differential undercount is purely a question of constitutional interpretation. That question will be no different whether it is presented before or after the actual redistricting is carried out with an unadjusted population count. Since the federal court "will be in no better position later than [it is] now to decide the constitutional question," *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102, 143-145 (1974), *Duke Power* at 82, that question is "ripe" for determination prior to the time that the actual redistricting occurs.

use this official population count as the population base for Congressional redistricting.

Nonetheless, this holding of the Court of Appeals is a radical departure from both the long-accepted view that federally-certified census figures are binding on the states for Congressional redistricting, and, as Judge Keith pointed out in his dissent, from the uniform historical practice in Michigan and all other states. (App. 32-33)[14] Precisely because the state legislatures have always used the federally-certified census figures as the data base for Congressional redistricting, this Court has never been called upon to decide expressly whether such use is constitutionally compelled.

The plaintiffs submit that this Court's holding in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), requires that federally-certified census figures be used as the population base for Congressional redistricting within a state. In *Wesberry*, this Court held that Art. I, § 2, cl. 3 is applicable to the apportionment of representation within each state just as it is applicable to the apportionment of representation among the several states.

It logically follows from the holding in *Wesberry* that the decennial census mandated by Art. I, § 2, cl. 3 must include provision for the determination of sub-state population totals for each state, so that the census may perform its constitutional function of apportioning representation in the United States House of

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[14] Congress also appears to believe that the states are constitutionally required to use federally-certified census figures as the data base for Congressional redistricting. This is evidenced by Congress enacting detailed provisions governing both the collection of sub-state population figures as a part of the decennial census, and the submission of those figures to the states for timely use in Congressional redistricting following the decennial census. 13 U.S.C. § 141(d).

Representatives. It also follows that just as Congress is required to use the official population count of the decennial census to apportion Congressional representation *among* the several states, the states are required to use the federally-certified substate population totals as the basis for apportioning Congressional representations within each state. Any other interpretation of Art. I, § 2, cl. 3 would be anomalous, and would negate the holding of *Wesberry* that Art. I, § 2, cl. 3 governs the apportionment of Congressional representation both among the states and within each state.

At issue here is the determination of the population base for the apportionment of representation in the United States House of Representatives. The Constitution mandates that the federal government, not the states, provides the "actual enumeration" for this *federal* purpose.

This Court should grant certiorari and reverse the Court of Appeals' holding on this important question of federal law.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE CONSTITUTION REQUIRES THAT THE OFFICIAL POPULATION COUNT OF THE 1980 DECENNIAL CENSUS BE ADJUSTED, PURSUANT TO PRESENTLY AVAILABLE SCIENTIFIC METHODS, TO REFLECT THE BLACK AND HISPANIC DIFFERENTIAL UNDERCOUNT.

The question of whether the Constitution requires that the official population count of the 1980 decennial census be adjusted for the Black and Hispanic differential undercount is a most important constitutional question. It goes to the essence of the fundamental principle of equal representation for equal numbers of people in the

United States House of Representatives. *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). While the data collected in the decennial census is used for a great variety of purposes, the sole constitutional function of the decennial census is to provide an official population count that when used for purposes of the apportionment of Congressional representation, will implement the constitutional principle of equal representation for equal numbers of people. Art. I, § 2 cl. 3 makes provision for the taking of a decennial census, so that there will be a federally-certified official population count that can be used to implement this fundamental constitutional principle.

The plaintiffs' substantive constitutional claim is based on Art. I, § 2, cl. 3, and on the principle of equal representation for equal numbers of people that this provision embodies. Because there is a Black and Hispanic differential undercount, and because the Black and Hispanic populations are concentrated in certain large cities, such as Detroit, these cities are disparately undercounted in relation to the rest of their state, where there is little or no Black and Hispanic population. As the District Court found, it cannot be disputed that an official population count, using only the raw unadjusted census data, does not accurately reflect the actual population of the cities and of the sub-state areas within each state. (App. 77-78 and 95-96)

When Congressional redistricting within a state takes place pursuant to an official population count that is not adjusted for the Black and Hispanic differential undercount, there is *constitutional distortion*. The residents of the cities and other areas of the state where Black and Hispanic populations are concentrated receive less representation and less weight of vote in the House of Representatives than do the residents of the remainder of the state, where there is little or no Black or Hispanic population.

Since an official population count of the decennial census that is not adjusted for the Black and Hispanic differential undercount is inaccurate, when used for the purpose of Congressional redistricting within the state, it will produce Congressional districts that are not drawn in accordance with the principle of equal representation for equal numbers of people. Therefore, plaintiffs contended, and the District Court held, that Art. I, § 2, cl. 3 requires that an adjustment be made in the official population count for the admitted Black and Hispanic differential undercount.[15] (App. 113)

Whether the Constitution mandates that the official population count of the 1980 decennial census be adjusted for the admitted Black and Hispanic differential undercount is a most important constitutional question. Certiorari should be granted so that it may be settled definitively by this Court.

This issue was not addressed by the Court of Appeals. However, this question is within the authority of this Court to determine in the grant of certiorari to review the judgment of the Court of Appeals. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582-583 (1979). Cf. *Vance* v. *Terrazas*, 444 U.S. 252, 258, n.5 (1980); *Carlson* v. *Green*, 446 U.S. 14, 17, n.2 (1980). This question is one of pure law, which was fully aired in the

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[15] An essential element necessary to the existence of a constitutional obligation to adjust for the Black and Hispanic differential undercount, of course, is the availability of scientific methods by which such an adjustment can be made, to produce a more accurate official population count than one derived only from the raw, unadjusted census data. On the basis of the evidence presented at trial, the District Court concluded that, "[t]here are proper and adequate methods of adjustment of the raw census data that can be used by the Census Bureau to give reasonably accurate and statistically defensible counts that are more accurate than the raw enumeration of the Census Bureau." (App. 101).

District Court. This Court, therefore, has the benefit of the District Court's views as to its appropriate resolution. This question was also briefed and argued by the parties in the Court of Appeals. The arguments made in the Court of Appeals will be the same arguments presented to this Court. It is in the public interest that this important question be resolved by this Court at the earliest possible opportunity[16]

This Court should now decide whether the Constitution requires that the official population count of the 1980 decennial census be adjusted for the Black and Hispanic differential undercount.

---

[16] Counsel for the defendants has represented to counsel for the plaintiffs that the Census Bureau has continued to carry out the program for measuring the Black and Hispanic differential undercount that was agreed to by the parties in the District Court. (App. 137-144) The final measurement of the differential undercount and the development of the final undercount adjustment rates are likely to be completed by the time that this case is decided by the Court. In the event that this Court decides this case in favor of the plaintiffs, and affirms the judgment of the District Court, the undercount adjustment techniques will be in place, and the adjustment can be implemented by the defendants under the supervision of the District Court.

It is possible, therefore, that the adjusted population count for the State of Michigan may still be available for use in Congressional redistricting for the 1982 elections. The primary election in Michigan will not be held until September, 1982, and efforts at Congressional redistricting may have not as yet been undertaken. Congressional redistricting in Michigan following the 1970 decennial census occurred pursuant to an order of the United States District Court for the Eastern District of Michigan, which was entered on May 31, 1972. *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972).

CONCLUSION

For the reasons stated herein, Petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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Appendix

81-867

No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLEMAN A. YOUNG, Individually and as Mayor, CITY OF DETROIT, and CITY OF DETROIT, a Municipal Corporation,
Petitioners,

v.

MALCOM BALDRIDGE, Secretary of Commerce of the United States, and BRUCE CHAPMAN, Director, Bureau of the Census,
Respondents.

PETITIONERS' APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution

Article I, Section 2, Clause 3, as amended by Amendment XIV, Section 2, states:

> Representatives and direct Taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers [counting the whole number of persons in each State], excluding Indians not taxed. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative* * *.

Article I, Section 2, Clause 3 of the Constitution provided in pertinent part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States,

> and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

Amendment XIV, Section 2 of the Constitution provides in pertinent part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding the Indians not taxed.

Amendment XV, Section 1 of the Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

STATUTES

Section 141 of the Census Act, 13 USC § 141(a) through (c) provides:

> § 141. *Population and other census information: tabulation for legislative apportionment*
>
> (a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date" in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officer or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulation of population for the areas identified in any plan approved by the Secretary shall be completed by

him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulation of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported and transmitted to each respective State within one year after the decennial census date.

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

COLEMAN A. YOUNG, Individually and as Mayor, CITY OF DETROIT, and CITY OF DETROIT, a Municipal Corporation,
Petitioners,

v.

MALCOM BALDRIDGE, Secretary of Commerce of the United States, and BRUCE CHAPMAN, Director, Bureau of the Census,
Respondents.

PETITIONERS' APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION

United States Court of Appeals
For the Sixth Circuit

(Entered June 15, 1981)

Nos. 80-1751, 81-1027

Young v. Klutznick, 652 F.2d 617.

Before: Keith, Merritt and Martin, Circuit Judges.

Merritt, Circuit Judge delivered the opinions of the Court, in which Martin, Circuit Judge, joined. Keith, Circuit Judge, (pp. 18-46) filed a dissenting opinion.

Merritt, Circuit Judge. In this suit by the City of Detroit and its Mayor against the Census Bureau Director and the Secretary of Commerce, the District Court found that the final 1980 census figures would understate the black and hispanic populations nationally and in Detroit by a statistically significantly but undetermined figure, unless adjusted. After finding in advance of the completion of the census that such an undercount would occur, the District Judge held that certification and publication of the figures without adjustment would violate the provisions of the Constitution requiring an accurate decennial enumeration of the population for the purpose of apportioning Congressional representation.[1]

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[1] Article I, Section 2, Clause 3 of the original Constitution provides:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

The provision of the original Constitution providing for Congressional representation based on three-fifths of the slave population was removed by the first sentence of Section 2 of the Fourteenth Amendment:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

He construed the Census Act as permitting the use of such an adjusted set of census figures fopurposes of determining Congressional representation.[2] He ordered that defendants withhold certification of the census figures to the states and the President, a certification required by statute,[3] until defendants devise and report to the Court for approval a statistically defensible means of adjusting the census figures to include the uncounted segments of the black and hispanice populations.

We reverse. Plaintiffs have shown no judicially cognizable injury and lack standing to sue. The claimed injury based on a state of affairs not yet in existence, and it is so hypothetical in nature that it does not present a controversy capable of judicial resolution.

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[2] The statutory construction issue arises from the language of 13 U.S.C. § 195 (1976).

> Except for the determination of population for purpose of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

[3] April 1, 1980, is the decennial census date for the 1980 census. The Census Act provides:

> The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b) (1976).

Section 141(c) provides in part "[B]asic tabulation of population of each other State shall, in any event, by completed, reported and transmitted to each respective State within one year after the decennial census date."

I. STATEMENT OF THE CASE

A. The Undercount Estimated on the Basis of Studies of the 1970 Census

The essential facts are not in dispute. Plaintiffs concede that the Census Bureau in 1980 made a conscientious effort to conduct an accurate head count of a diverse nation of approximately 225 million people using sound demographic methods developed over many years with the advice of leading scholars in many fields. Plaintiffs do not claim that the Census Bureau has discriminated against any class, blacks, hispanics, or others, or any town or region, Detroit or any other place, in the methods used to conduct the head count. On the contrary, all parties agree, including plaintiffs and their experts, that at great cost the Census Bureau, upon direction of the President and the Congress, has taken new and creative steps during the 1980 census to find and count disadvantaged groups.

No claim is made that upper and middle class blacks and hispanics are undercounted in comparison with whites of the same economic class. Rather, plaintiffs have demonstrated the undeniable fact that for a complex set of reasons[4] it is more difficult to count the poor and the uneducated, whether black or white, than the middle class and the well-to-do. Plaintiffs rely on Census Bureau studies of previous census figures that

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[4] Many factors account for the fact that some individuals are more difficult to count than others: attitudes toward government, visibility, and stability are personal characteristics which vary among regions and and among different groups depending on age, sex, income, literacy, immigration status, employment, race and other cultural and religious traditions which mold living styles and environment. Non-personal factors such as climate, census procedures, house design and distance between homes also contribute.

show that, as a group, more blacks are missed than whites because, as a group, blacks are more disadvantaged.[5] Plaintiffs' key witness, Dr. Philip M. Hauser, a former director of the Census Bureau and chairman of the University of Chicago Sociology Department, stated the basic reason for previous undercounts of the black population: "It is not a question of color; it is not the difference in color that makes them hard to count. It is that whole cluster of characteristics associated with color which stands as a proxy for this cluster of characteristics" (App. 405).

The demographic and statistical theory that blacks are necessarily undercounted at a substantially higher rate than whites is supported by comprehensive studies of the 1970 census.[6] In that census 203 million people were counted, 178 million of whom were identified as white and 23 million of whom were identified as black. Through a combination of survey methods, the Census Bureau now estimates that the 1970 census undercounted the black and white populations as shown on this graph:

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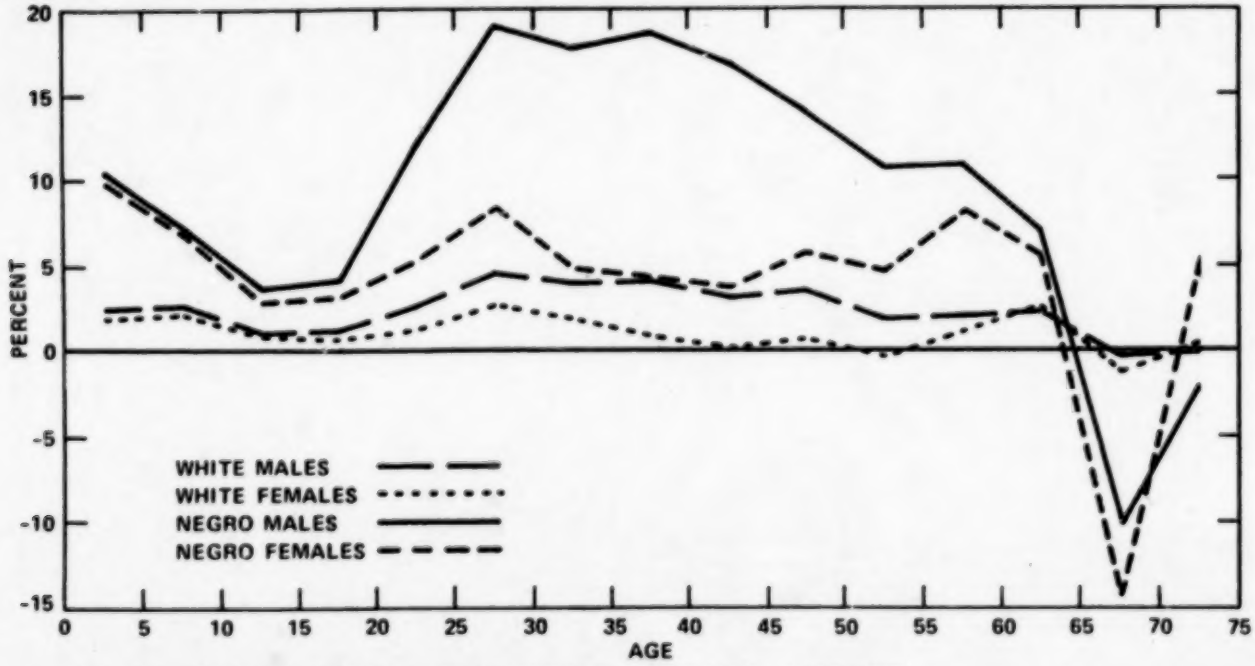
[5] It is estimated that approximately one-third of the nation's approximately 25 million blacks fall below the income-based poverty line, but the estimated figure for whites as a group is much smaller.

[6] These studies were completed three years after taking the census. For purposes of this case it is not important to explain in detail the survey methods on which this estimated undercount is based. It is sufficient to note that experts seem to agree that "demographic analysis" provides the most reliable testing procedure. Under this method the demographer tests the census by using the age, sex and race breakdowns from previous censuses supplemented by other data — for example, birth and death registrations and medicare records. The Census Bureau also uses reinterview surveys and samples in order statistically to project standard rates of deviation and error.

Figure 5. COMPARISON BY RACE AND SEX OF PERCENT NET UNDERCOUNTS, BY AGE: 1970



NOTE: ESTIMATES FOR 1970 ARE BASED ON ADJUSTED CENSUS DATA. A NEGATIVE SIGN DENOTES A NET CENSUS OVERCOUNT.

Extrapolating from the studies, the parties agree that the 1970 census probably undercounted the white population by approximately 2%, or 3.5 million, and the black population by approximately 8%, or 1.8 million. Although the Census Bureau is unable to break the undercount down by state or locality, the parties tentatively agree that the largest undercounts probably occurred in the poorer sections of large cities and in certain rural areas of the South.

At the time of the trial of this case in August 1980, the Bureau had not completed any interim or final figures for the new census because the tabulation of the census returns was still in process. The parties were unable, therefore, to estimate the 1980 undercount. One of plaintiffs' experts testified that "we don't know anything about the undercount in the 1980 census except some very broad assertions and expectations that the racial undercount will not disappear . . ." (Dr. Taeuber, App. 638). Another expert of plaintiffs testified that no one could predict whether the 1970 undercount would be repeated in the 1980 census: "This doesn't mean that this [the 1970 undercount estimate] will be what happens in 1980. I don't know, I repeat, nor does anyone else" (Dr. Hauser, App. 478).

The Census Director and other officials testified in detail at the trial about the procedures used and the improvements made in conducting the 1980 census. They predicted hopefully that the added efforts would reduce the undercount. They explained that they had made earlier predictions, based on demographic analysis, that the final 1980 head count would be approximately 222 million and that the undercount would be approximately 5 million, or around 2%. They explained the difficulty and time consuming nature of arriving at a reliable

estimate of the undercount. They explained that survey techniques and demographic analysis were not sufficiently advanced as sciences to permit distribution or allocation of the estimated undercount to states and localities on anything other than a pro rata basis using population figures from the census. They explained that since 1790 the census enumeration has never been adjusted to reflect an estimated undercount and that in their opinion Congress by statute had prohibited such an adjustment in the figures used for purposes of Congressional apportionment.[7] Finally, for a combination of reasons, they expressed severe reservations about making such adjustments to the census head count. The reasons included the questionable reliability of any such estimate at the national level, the absence of any sound scientific theory for allocation of the national undercount, however determined, to the states and cities, the risk of undermining public confidence and public use of the census and the likelihood that the internal consistency of census data will be destroyed if hasty adjustments are made which add to states, localities and enumeration districts numbers of people who may not exist.

After the trial the District Court ordered defendants to estimate the undercount for blacks and hispanics, adjust the national census count accordingly, allocate the adjusted undercount to states and cities on a pro rata basis and withhold certification of the figures until this task is accomplished. Thereafter, the Supreme Court stayed the portion of the District Court's order requiring defendants to withhold certification of the unadjusted figures to the President and the states.

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[7] See footnote 2, *supra*.

B. The 1980 Undercount Estimate Based on the 1980 Census

Two other significant events have occurred during the pendency of this appeal, events which we notice judicially. *See* Fed. R. Evid. 201. On December 11, 1980, the Census Bureau announed its decision that it would not on its own initiative, voluntarily adjust the 1980 census count for under-enumeration but would obviously comply with any final court orders requiring it to do so. In a lengthy position paper supporting its position (filed with the Court at oral argument on February 12, 1981), the Census Bureau stated that "it is now clear" from the tabulation of 1980 returns that the head count "will exceed the April 1980 estimate by a very large margin." Instead of counting 222 million people, as previously estimated, "the *minimum* final count for the Nation as a whole has reached 225.2 million" and "now is expected to be between 225.7 and 226.0 million persons." These figures come close to the pre-census estimate of the head count plus the pre-census estimated undercount. In the December 11 document, the Bureau stated its view that the 1980 undercount is probably considerably smaller than in prior censuses due to the improvement of census procedures. It says that "the apparent zero undercount results from the under-enumeration of legal residents being offset by enumeration of illegal residents." Based on these circumstances, the Bureau draws the conclusion: "At present, the Bureau has no sound statistical basis for estimating the true undercount or introducing the adjustments." It further explains this conclusion as follows:

> The relative undercount was probably considerably smaller in 1980 than in earlier censuses but its extent

> and distribution cannot be reliably defined or estimated because we are not able to measure how many illegals were present and counted. In the absence of reliable information on illegals, and in light of the data now in hand, it is clear that the "true" population and, hence the undercount for 1980 cannot be reliably estimated in the near term, if at all. Because of the much smaller measured undercont, it is our firm judgment on statistical grounds that adjustments for undercount are not in the public interest.

45 Fed. Reg. 82874 (1980).

The second significant event occurred February 23, 1981, when the Census Bureau released its "1980 Census Population Totals for Racial and Spanish Origin Groups in U.S." That report shows the following figures:

United States	1980	1970	Percent Distribution 1980	Percent Distribution 1970
Total	226,504,825	203,211,926	100.0	100.0
White	188,340,790	177,748,975	83.2	87.5
Black	26,488,218	22,580,289	11.7	11.1
American Indian, Eskimo, and Aleut	1,418,195	827,268	0.6	0.4
Asian and Pacific Islander	3,500,636	1,538,721	1.5	0.8
Other	6,756,986	516,673	3.0	0.3
Persons of Spanish Origin	14,605,883	9,072,602	6.4	4.5
Persons not of Spanish Origin	211,898,942	194,139,324	93.6	95.5

The report states:

> Comparisons with demographic estimates suggest that the 1980 undercount rate for blacks may be in the range of 4.5 to 5.5% compared to the estimated miss rate of 7.7% in 1970. In short, the Bureau feels that it may have achieved a 30-40% improvement in the undercount rate between 1970 and 1980. Similar analyses for other groups have not been completed.

C. The Remedy Imposed by the District Court

The parties appear to agree that neither the Census Bureau nor any other institution — certainly not the federal courts independently — have the resources or expertise "to develop a statistical and analytical methodology which will permit adjustment of [the census for] critical variables (i.e., selected subnational geographical units and selected characteristics) in a timely fashion." 45 Fed. Reg. 82877 (1980). The undercount cannot be accurately distributed to "subnational geographic units" because we do not know in which communities the uncounted live. That leaves the remedy adopted by the District Court as the only possible remedy for correcting an undercount, the only remedy that anyone has seriously proposed. This remedy is a so-called "synthetic method" of adjustment. This method, simply stated, distributes an undercount, based on race, age, sex or other characteristics, to counties, cities, states or regions in accordance with the actual local head count already obtained by the census for that particular group. It requires a pro rata distribution of the undercounted elements of the population.

The Census Bureau points out that past samples and studies show that there are substantial geographical

variations in any undercount and that synthetic distributions "introduce serious distortions not present in the unadjusted data" *Id.* If it should be the case that all or parts of Minneapolis, Dallas, Pasadena and Pittsburgh are relatively affluent and easy to count, it introduces serious distortions in the census, when we increase their voting strength by adding people who are not there. To give another example of the distortions inherent in the synthetic method, one city whose hispanic population may not be undercounted at all — Coral Gables, Florida — would receive a population increase, and hence more legislative representation, than a rural county in North Florida whose disadvantaged black and white populations were undercounted at a much higher rate than the national average.

The proposed remedy may not redress, but rather may exacerbate the condition to be corrected for another reason as well. If the undercount of whites is on the order of 3 million people (approximately 1.5%) and most of this undercount comes from the approximately 15% of the white population that is hard to count because disadvantaged, as appears to be the case, the synthetic method, employed consistently, would distribute 85% of the white undercount, or 2.5 million people, to the 85% of the white population who are, relatively speaking, better off. Such a distribution would simply have the effect of adding to the voting strength of that segment of the white population which is least undercounted. Since there would appear to be little or no undercounting of the top 25% of the white population, such a distribution has a practical effect of taking voting strenth from disadvantaged whites and giving it to advantaged whites.

The same result occurs when we distribute the black undercount. The major portion of an estimated 1 million black undercount (approximately 4%) apparently comes from the approximately 30% of the black population at or below the poverty line because they are hard to count. Yet the synthetic method would add 70% of the black undercount to the voting strength of the more advantaged group, the black middle class. As in the case of whites, distribution of the black undercount according to the synthetic method has the effect of taking voting strength from the disadvantaged black population and giving it disproportionately to the more advantaged members of the same class.

II. JUSTICIABILITY

A. Standing

The issue of standing arises from the language in Article III that "[t]he judicial Power shall extend to . . . Cases . . . [and] Controversies . . ." U.S. Const. art. III, § 2. The Supreme Court has held that restrictions upon standing are necessary to guarantee that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as "capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968), "so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues,' *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 90 (1947), or case[s] . . . of 'a hypothetical or abstract character.' *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240 (1937)." *Id.* at 100. *See also Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976); *Warth* v. *Seldin*, 422 U.S. 490 498-500 (1975); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616-17 (1973). In

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S 150, 154 (1970), the Supreme Court further characterized its doctrine of standing and reviewability as a "rule of self restraint" for its own governance." In addition to the minimum requirements imposed by Article III, courts have developed rules to limit their exercise of jurisdiction in particular cases when prudential considerations militate against invocation of the judicial process. *See, e.g., Warth* v. *Seldin, supra*, at 499-500, and cases cited therein.

In *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59, 72-73 (1978), the Court stated that the standing rule requires "not only a 'distinct and palpable injury' to the plaintiff . . . but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct," "or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries." Thus, when focusing on the question of a plaintiff's standing the relevant considerations are the existence of an injury, its cause, and the existence of a remedy for redress of the injury.

Our view of the standing issue does not arise because we have any doubts about the values and the general policy that plaintiffs seek to promote in asserting the underlying claim — the desire to achieve equality for a racial minority. Rather it arises from the kind of inquiry that is necessary to dispose of the underlying claim for injunctive relief — an inquiry based on an assumption that plaintiffs will be injured because the Michigan legislature will act in a particular way and an assumption that the injury can be remedied by a pro rata distribution to cities and towns across the nation of whatever national undercount exists. We hold that the first assumption is not warranted. We do not find it necessary to pass on the validity of the second assumption.

Plaintiffs' theory of standing is concisely stated in their brief. They do not claim that the undercount deprives the State of Michigan of congressional representation.

> The injury to the Plaintiff Young's right of equal representation and equal weight of vote in the United States House of Representatives relates to the use of unadjusted census data for the apportionment of Congressional representation *within the State of Michigan* . . . .
>
> The City of Detroit will be disparately undercounted in relation to the predominantly White suburbs and other areas of the state having little or no Black or Hispanic population.
>
> . . . .
>
> The injury to the plaintiff Young's right to equal representation and equal weight of vote in the United States House of Representatives results directly from the fact that the Census Bureau certifies an official population count of the cities and sub-state areas of the State of Michigan that is not adjusted for the differential undercount of Blacks and Hispanics. The official population count as certified by the Census Bureau will be used by the Michigan Legislature or the federal courts if necessary . . . as it will be by the legislature of all the other states, to redistrict representative districts for the United States House of Representatives. Because that official population count is not adjusted for the Black and Hispanic differential undercount, an apportionment pursuant to that official population count has caused and will cause injury to the Plaintiff Young's right to equal representation and equal weight of vote.

Brief of Appellee 54-57 (emphasis added).

If the Constitution leaves the Michigan legislature free to adjust the census figures reported by the Census Bureau, then the Michigan legislature might adjust the census data, thereby preventing the anticipated harm. No injury, of course, has occurred as yet; this suit is an attempt to preclude the possibility of future harm. If the Michigan legislature may adjust for the undercount, whether the injuries feared by plaintiffs do in fact arise does not depend upon defendants' actions. An independent third party, the Michigan state legislature, would play a necessary role in determining the effects of the census upon plaintiffs.

Contrary to the assertions by plaintiffs, the state legislature is not required by the Constitution to accept in all respects the census data supplied by the Bureau. Article 1, § 2 of the Constitution requires that "as nearly as is practicable" one person's vote is to be worth as much as another's vote in apportioning congressional representation. *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-28 (1969), *citing Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). To achieve this goal, limited population variances from district to district will be tolerated only if these variances are "unavoidable despite a good-faith effort to achieve absolute equality, or . . . [if] justification is shown." *Kirkpatrick* v. *Preisler*, 394 U.S. at 531. *Kirkpatrick* rejected as a justification the claim that population variances were due to legislative attempts to take into account projected population shifts. The Court concluded that when the population changes over the ten year period between censuses, states that are redistricting may properly consider the population shifts. But "[f]indings as to population trends must be thoroughly documented and applied throughout the state in a systematic, not an *ad hoc*, manner." *Id.* at 535.

It is evident that states may use adjusted population figures when redistricting between census years. There is no reason to believe that states would not be free to adjust census figures for redistricting in the census year, as long as the adjustment is "thoroughly documented" and applied in a "systematic" manner. *See also Burns* v. *Richardson*, 384 U.S. 73, 91 (1966) (in state legislative apportionment cases, the Constitution "does not require the States to use total population figures derived from the federal census as the standard" of measurement).

The goal in any redistricting is to assure that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). If the Census Bureau had erroneously undercounted the Detroit area by 25%, the Michigan legislature would not be precluded from adjusting the figures for puposes of congressional apportionment. Although the Constitution prohibits subterfuge in adjustment of census figures for purposes of redistricting, it does not constrain adjustment of census figures if thoroughly documented and applied in a systematic manner.

Plaintiffs also argue, however, that even if the state legislature is not constitutionally compelled to use the Bureau's census data, nonetheless it is very probable that the legislature will accept the data without adjustment. Thus the Michigan legislature is not an intervening independent actor, and the Bureau must still be considered the cause of plaintiff's injury. We disagree. Having found no legal compulsion that the state act in a certain way, we may not predict what decisions the state legislature will, in fact, make. The legislature may decide to conduct a recount or to adjust the state population to take the undercount into consideration for the purpose of

apportioning Congressional seats. Thus we simply do not know whether plaintiffs will be harmed by the decision of the Bureau not to adjust its figures. The presence of an intervening actor casts doubt — at least at the present time — upon the existence of the injury felt by plaintiffs. The Supreme Court has stated, "[T]he 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court. *Simon, supra*, 426 U.S. at 41-42.[8]

B. Ripeness

Standing doctrine imposes constitutional limitations on federal courts' jurisdiction. Even when jurisdiction is technically present, however, the Supreme Court has recognized that " 'problems of prematurity and abstractness' . . . may prevent adjudication in all but the

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[8] A secondary standing consideration is related to the question of remedy. Although this relationship has never been well-defined, either before or after the changes in the standing doctrine defined in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), *see* Vining, *Legal Identity* 26 (1978), standing does still depend on the existence of a situation where "the exercise of the Court's remedial powers would redress the claimed injuries." *Duke Power Co., supra*, 438 U.S. at 73. Obviously there are many unjust conditions and occurrences, natural and man-made, which federal courts do not have the strength, wisdom or power to remedy in a timely manner. When there is no realistic remedy available, there is no point in deciding the merits. In light of our disposition of the justiciability issue based on other considerations, we need not decide whether the only remedy available — the synthetic method — is so unrealistic that it defeats standing to litigate the case on the merits.

exceptional case." *Buckley* v. *Valeo*, 424 U.S. 1, 114 (1976), *quoting Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972). Such questions of ripeness, the Court has held, are resolved through two inquiries. Courts must first "determine whether the issues tendered are appropriate for judicial resolution," and then "assess the hardship to the parties if judicial relief is denied at that stage." *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 162 (1967). Plaintiffs satisfy neither inquiry in this case.

The question whether tendered issues are appropriate for judicial resolution clearly "bears close affinity" to questions of standing. *Warth* v. *Seldin*, 422 U.S. 490, 499 n.10 (1975). The precise focus of ripeness doctrine is that it is "peculiarly a question of timing." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). As Justice Fortas has pointed out in the context of pre-enforcement attacks on administrative regulations, the reason for deferring consideration of abstract or premature claims is to allow governmental processes.

> an opportunity to function — to iron out differences, to accommodate special problems . . . The courts do not and should not pass on these complex problems in the abstract and the general — because these regulations peculiarly depend for their quality and substance upon the facts of particular situations. We should confine ourselves — as our jurisprudence dictates — to actual, specific, particularized cases and controversies, in substance as well as in technical analysis.

Abbott Laboratories v. *Gardner*, 387 U.S. 136; *Toilet Goods Association* v. *Gardner*, 387 U.S. 158; *Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 200 (1967) (Fortas, J., concurring and dissenting). Because the Michigan state legislature has not yet expressed its reaction to the

census enumeration, the issue before this Court has not become as "specific" or as "particularized" as it will become after the legislature acts. Heightened public sensitivity to the problems of census undercounts makes past reliance on census figures an uncertain predictor of future legislative action. Even if the ultimate response of the legislature could be predicted with some confidence, however, the fact that it is a representative, deliberative organ of state government rather than a private party must make this Court hesitate to exercise its power so as to narrow the range of solutions it might consider. As the Supreme Court has pointed out, the reasons a governmental body might provide for its actions are important in review of those actions. *Toilet Goods Association* v. *Gardner*, 387 U.S. at 163.

Consideration of the "hardship to the parties" of a present denial of judicial relief also points toward a refusal to adjudicate plaintiffs' claim. The dilution of voting power on which they base their claim may not occur at all, and cannot occur until the Michigan legislature acts. That fact makes plaintiffs' claim unlike that in *Duke Power Co.*, where the Court rejected a ripeness claim because the plaintiffs would sustain immediate injury were the Court not to act. 438 U.S. at 81.

Accordingly, the judgment of the District Court is reversed.

Keith, J. dissenting. In a carefully considered and well written opinion, District Judge Horace W. Gilmore concluded that the Census Bureau must adjust its final 1980 census totals to correct the widely acknowledged and differential undercounting of Hispanics and black Americans. Today, the majority reverses in an opinion that is rife with legal and factual misanalysis. I must respectfully dissent.

I.

Although the majority opinion contains a substantial amount of far ranging dicta, its holding is limited, technical and I think, myopic.[1] It rules that this case is not justiciable because either the plaintiffs lack standing or because the controversy presented by the parties is

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[1] In his opinion for the majority, Judge Merritt makes a number of statements in dicta which have no support in the record. Specifically, the majority states:

> No claim is made that upper and middle class blacks and hispanics are undercounted in comparison with whites of the same economic class. Rather, plaintiffs have demonstrated the undeniable fact that for a complex set of reasons it is more difficult to count the poor and the uneducated whether black or white, than the middle class and the well-to-do. Plaintiffs rely on Census Bureau studies of previous census figures that show that as a group, more blacks are missed than whites because as a group, blacks are more disadvantaged. Plaintiffs' key witness, Dr. Philip M. Hauser, a former director of the Census Bureau and chairman of the University of Chicago Sociology Department stated the basic reason for previous undercounts of the black population: "It is not a question of color; it is not the difference in color that makes them hard to count. It is that whole cluster of characteristics associated with color which stands as a proxy for this cluster of characteristics." (citation omitted)

Proceeding from this premise, the majority goes on to conclude that a synthetic adjustment technique might be unfair:

> The major portion of an estimated 1,000,000 black undercount (approximately 4%) apparently comes from the approximately 30% of the black population at or below the poverty line because they are hard to count. Yet the synthetic method would add 70% of the black undercount to the voting strength of the more advantaged group, the black middle class. As in the case of whites, distribution of the black undercount according to the synthetic method has the effect of taking voting strength from the disadvantaged black population and giving it disproportionately to the more advantaged-members of the same class.

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not sufficiently ripe. Judge Merritt, speaking for the majority, rules that "[t]he plaintiffs have shown no judicially cognizable jury and lack standing to sue. The claimed injury is based on a state of affairs not yet in existence, and it is so hypothetical in nature that it does not present a controversy capable of judicial resolution."

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The majority opinion presents an amusing sociological analysis. It would be nice if the court's views had some support in the record. Unfortunately, they do not.

All of the expert witnesses agreed that there is an undercount and that no census can count everyone. As the tables reproduced in the majority opinion show, the undercount varies according to three major variables: age, sex and race. In terms of electoral voting power, the significant variable is, of course, race. Dr. Carl Taeuber's undisputed testimony below established that the black community of this country is concentrated in urban areas. Thus, a disproportionate racial undercount, combined with geographical concentration of blacks, results in underrepresentation of those areas with concentrated black populations.

As noted above, the majority claims that the racial variable in census undercounts is a myth. According to the majority, the racial variable is really an economic variable; it is poor people who are undercounted. The only reason blacks are undercounted more than whites, according to the majority, is that blacks are poorer than whites.

The record contradicts these bald assertions. Dr. Hauser did state that the lower socioeconomic status of blacks was "the most important factor in the undercount that is measured by race." (App. at 421). However, he stated that the undercount was "due to a number of factors." (App. at 402). Dr. Hauser's testimony was well summarized in Judge Gilmore's opinion below:

> Extensive expert testimony as to the underlying causes of the differential undercount was taken. Although the precise weight

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I respectfully disagree with both parts of this anaylsis. I believe that the court misuses standing and ripeness doctrines in order to avoid grappling with a serious question of constitutional harm.[2] I would reach the

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> to be attributed to the various factors involved is not known, all of the experts agreed that some or all of the cluster characteristics associated with race are major factors. In this regard, Dr. Philip M. Hauser, a witness for the plaintiffs, stated that the following characteristics should be considered important:
>
> 1. lower income leading to diverse and unique housing patterns and living arrangements which frequently involve the lawful or unlawful conversion of housing units to accommodate increased numbers of people;
> 2. greater antagonism or resistance to government;
> 3. relatively less education; and
> 4. increased numbers of individuals within the harder-to-enumerate categories, such as young males.

497 F. Supp. at 1327-28

Examination of Dr. Hauser's testimony reveals that race is indeed the critical factor in gauging an undercount. All that Dr. Hauser is saying in the passage quoted by the majority is that the combination of the factors of poverty, alienation, less education, and youth correlate with race and it is these factors which explain why there is an identifiable racially differential undercount of blacks and Hispanics. This is clear upon examination in context of Dr. Hauser's testimony quoted by the majority:

> Remember this, a third of all blacks live in poverty by the government standards. Twenty-seven per cent of Hispanics live in poverty by government standards. The combination of their socioeconomic status, residences which are often of substandard quality, hard to locate, residential patterns of occupancy which make it very difficult to find separate households within cramped quarters, converted structures, some legally converted, some illegally converted, that the socioeconomic status of our minority groups is such that by reason of that status and other research by the Bureau tends to support this, that they are difficult to count. It is not certainly a question of color, it is not the difference in color

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merits, and although I am in substantial agreement with the district court's analysis, I would remand this case to the district court for further fact-finding in light of data which has become available subsequent to the district court's decision.

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> that makes them hard to count. It is that whole cluster of characteristics associated with color which stand as a proxy for this cluster of characteristics. Are these characteristics that result from a history of prior discrimination against minority groups in this country? Well, that is certainly clear, yes.

App. at 404-05

In fact, Dr. Hauser's position became crystal clear in later testimony:

> [C]ertainly no one is going to argue that the reason for the differential and undercount is traceable by the color of the skin or the ethnic origin. The reason for the undercount is traceable to the whole cluster of characteristics of these people for whom the designation of race or origin is a proxy. Now it turns out, as census statistics make quite clear, that these two populations are socially and economically greatly disadvantaged when compared with whites. They have lower education, they have much lower income, they live in much larger proportions of substandard dwellings, there are much larger proportions of people living in poverty, as measured by government standards itself. They are highly concentrated and segregated within the inner cities of metropolitan United States as my colleague, Dr. Taeuber, will be indicating in greater detail later. *Now, these clusters of characteristics that characterize respectively the black and the Hispanic populations are pretty uniformly distributed through the black and Hispanic populations* in the areas in which they are predominantly concentrated, the inner cities of our large metropolitan areas. And so, if you make these adjustments, you are very definitely I think correcting what amounts to be the most grievous aspects of census undercount.

App. at 432-33. (emphasis added)

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A. Standing

I agree that the majority correctly outlines the modern law of standing. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970) and *Barlow* v. *Collins*, 397 U.S. 159 (1970), the Supreme Court established the injury-in-fact requirement for consti-

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Additional support comes from Dr. Carl Taeuber's testimony:

> The estimate of a substantial black undercount has been made for each census, going back to this period when blacks were very heavily rural and southern. As blacks have moved to the cities and to the North, this differental undercount has persisted. This is a kind of historical suggestion that it's not simply because the blacks were rural or because Hispanics were migrant laborers. The undercount persists even as these populations have become heavily metropolitan. Now in fact, for the recent censuses, particularly for 1970 and from what we know already of what the 1980 results will show, we know that the blacks and Hispanics are still subject to a considerable amount of housing discrimination and job discrimination, which tends to help produce these concentrations, the residential segregation, which means that *the middle class members of these groups as well as the working class, the poorer members, all tend to live predominantly in these ghettos or barrios. They are not widely dispersed by social class in the same degree that the white population is.* We know that within these concentrated minority areas there is a very low social and economic status. There are many broken families, there is very high rate of residential mobility, people moving from one rental unit to another, there are many unusual household and living arrangements, relatives, boarders, and the like. There is within these populations a fairly high degree of antagonism toward government, as represented in some of the riots we have recently had, as represented in a lot of the concerns say in the Hispanic community about problems of deportation, concern with the legal status of the people in relation to the government, fear of cooperation with the census and other government agencies. Now this would suggest that we should get — that the circumstances are generally similar from one

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tutional standing. Subsequent decisions have made clear that in order to show injury-in-fact a plaintiff must establish a "distinct and palpable injury" and a fairly traceable causal connection between the claimed injury and the challenged conduct. *See Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Orr* v. *Orr*, 440 U.S. 268, 271-73 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72-3 (1978). A

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> ghetto to another, that the general features which may produce the undercount, as I must say we don't know exactly what those features are, we do know that many blacks and many Hispanics are missed, but we don't know exactly why. *Now something in this cluster of attributes may be pertinent, and I think it has a lot to do simply with minority status rather than simply living arrangements* because the Bureau, not just in 1980, the Bureau of the Census also for 1970, for which we do have major undercount status, did make major efforts to enumerate, did have special compaigns and the like was aware of the problem ahead of the census, did the best they could and still came up with a substantial differential undercount. Now if every one of those ghettos and barrios is expected to have a substantial undercount, then the application of the synthetic method fits the criteria that there is a high degree of similarity within each of the concentrations, so that assuming that the national rate applies to each one of these areas, is a reasonable assumption, it is a very plausible assumption. Now let us assume that we know that at the national level then blacks are undercounted at a rate of 8 percent and whites at a rate of 2 percent, the same four to one differential. In your opinion then, would an adjustment of the black and Hispanic population of each state and sub-state area by 8 percent and an adjustment of the white nonHispanic population by 2 percent get us closer to the truth than the raw unadjusted census data?
>
> A. Yes, it would.

App. at 623-27 (emphasis added).

The majority baldly asserts that "no claim is made that upper and middle class blacks and hispanics are undercounted in comparison

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plaintiff can satisfy the causation requirement by showing that there is a "substantial likelihood" that the relief requested of the court will redress the claimed injury. *Duke Power Co.* v. *Carolina Environmental Study Group, supra,* at 75 n.20; J. Nowak, Handbook on Constitutional Law 73-9 (1978); *id.* 1978 Pocket Part at 7; L. Tribe, American Constitutional Law 92 (1978). Although the court correctly outlines the law of standing, it misapplies that law to the facts of this case.

The majority does not seriously dispute the fact that plaintiffs have established the requisite injury for standing purposes. The district court found below that the plaintiffs would lose a proportionate amount of

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with whites of the same economic class." Dr. Taeuber's testimony refutes this assertion:

> Q. And was it the thrust of your testimony that from a sociological and demographic perspective, there is no reason to believe that the undercount rate of blacks and Hispanics varies significantly from one place to another?
>
> A. Yes, that was the thrust of it . . .

The above testimony refutes the majority's simplistic suggestion that undercounts are class-based and not race-based — that the few blacks or Hispanics in the suburbs are undercounted to a significantly lower degree than their counterparts in other areas. In fact, no authority that I have seen or heard of makes that suggestion. Under these circumstances. I can only wonder whether the author of the majority opinion read the same record that I did.

[2] *See* Note, *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 54, 212 (1976); L. Tribe, American Constitutional Law 93 (1978). *See also* Lewis, *Constitutional Rights and the Misuse of Standing,* 14 Stan. L. Rev. 433, 439 n22 (1962) (relying upon standing doctrine "may lead to a shorter, more easily written opinion, but it will also lead to inadequate consideration of the real issue or conceal the actual thought process which produced the result.")

political representation equal to the amount of differential undercounting in the federal census. There is little question that such a loss of political representation constitutes the kind of "distinct and palpable" injury necessary to establish constitutional standing. *See, e.g., Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). But the majority concludes that the plaintiffs nevertheless lack standing because the second prong of the injury-in-fact requirement is not satisified. It holds that the plaintiffs' loss of representation is not caused by the Census Bureau's differential undercounting of minorities, but is caused solely by the redistricting decisions of the Michigan state legislature. It bases this finding of intervening causation on the fact that the state legislature is not required by law to use the sub-state population totals supplied by the Bureau. If the state legislature chooses to use Bureau supplied figures for state reapportionment, the majority holds that this decision would be an independant act breaking the chain of causation between the challenged actions of the Census Bureau and the injury to the plaintiffs. I cannot accept this conclusion because, in my view, it construes the causation component of the injury-in-fact requirement far too strictly.

The causation component of modern standing analysis has been grafted from the causation theory of the law of torts. In tort law, two forms of causation are recognized. The first is "but for" causation or the *sine qua non* rule. The second is "proximate" or "legal" causation. I think it is clear that under either approach causation exists in the

circumstances of this case for purposes of establishing constitutional standing.[3]

In "but for" causation, a defendant's conduct is not a cause of the event if the even would have occurred without it. *See* W. Prosser, Law of Torts 238-9 (4th ed. 1971); Smith, *Legal Causes in Actions of Tort*, 25 Harv. L. Rev. 103-9 (1911). Under this formula, if injury would have occurred to the plaintiff *but* for defendant's conduct, the defendant is liable for the whole injury "regardless of its position in the string of acts leading to the injury though one or more of the other causes contributing to the result also involved wrongdoing on

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[3] Causation analysis exists in areas of the law other than torts and standing. Although the analysis may be phrased in different ways when it appears in different areas of the law, upon closer examination causation can only be viewed in terms of either "but for" cause or proximate cause wherever it appears. For example, causation in the substantive criminal law and in criminal procedure takes the form of either "but for" or proximate cause depending on the circumstances. *See* 7 Wharton's Criminal Law § 193-211 (1974) (discussing the causual connection between offender and offense). *See also United States* v. *Crews*, 445 U.S. 463 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Wong Sun* v. *United States*, 371 U.S. 471 (1963) (cases applying the "fruit of the poisonous tree doctrine" under the Fourth Amendment's exclusionary rule).

Since these two principles — proximate and "but for" cause — represent the only available modes of causation analysis in the law, it is reasonable to expect the Supreme Court to adopt them as it provides further explication of the second prong of the injury-in-fact constitutional standing requirement. Since it would be unreasonable to expect the Court to invent new causation principles which would operate solely in the law of standing, the tort causation analogies relied upon in this dissent should control here.

the part of other persons." F. Harper & F. James, 2 The Law of Torts 1121-22 (1956).[4]

Proximate cause, on the other hand, refers to the "more or less undefined considerations which limit liability even where the fact of causation is clearly established." Prosser, *supra* at 244. Under proximate causation theory, an act occurring after the defendant's action and before the plaintiff's injury can be an "intervening cause," *i.e.* one which erases any responsibility on the defendant's part. However, "[i]f the intervening cause is one which in ordinary experience is reasonably likely to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, he may be negligent only for that reason." *Id.* at 272. In other words. "[f]oreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility." *Id.* at 273.[5]

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[4] A "refined" variation of "but for" causation is the substantial factor theory. Under this approach, a defendant's conduct is a cause of an event if it is "a material element and a substantial factor in bringing it about." Prosser, *supra* at 240. However, even under this variation of "but for" causation a defendant "will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present. In particular, however, a defendant is not necessarily relieved of liability because the negligence of another person is also a contributing cause and that person, too, is to be held liable." *Id.* at 240-41.

[5] The Supreme Court has not specifically decided which of these forms of causation analysis governs the second prong of the injury-in-fact standing requirement. *See* Note, *The Causal Nexus: What Must be Shown to Sue in Federal Courts*, 29 Univ. Florida L. Rev.

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If the Census Bureau failed to supply sub-state population figures, containing a differential undercounting of minorities, the state legislature could not then reapportion on the basis of those figures. Therefore, "but for" cause is present. As previously mentioned, the district court found that the plaintiffs would lose a proportionate amount of voting representation equal to the amount of differential undercounting in the federal census. This is the claimed injury

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250, 256 (1977). It is clear, however, that a causation requirement for standing purposes which is more strict than that required in the tort law is impermissible. *See* note 3 *supra*. In fact,

> "unlike tort cases, standing questions do not involve the liability of a private defendant for the consequences of his actions, but instead are concerned with the individual's rights to obtain a judicial forum to protect himself from injurious government action. Since it is a threshold determination, *the standing test should not be as strict as that which must be met on the merits. Instead the courts should be satisfied with a demonstration of a reasonable possibility of a causal relationship*. *Id.*, at 257-8 (footnotes omitted) (emphasis added).

The Supreme Court has implicitly recognized this principle. In *Duke Power Co.* v. *Carolina Environmental Study Group, supra* at 75 n20, the Court expressed the "but for" causation standard for standing purposes in the following terms: Whether "there is a 'substantial likelihood' that the relief requested will redress the injury claimed." (citations omitted). In other words, if there is a 'substantial likelihood' that an injury would not occur without challenged conduct, standing causation exists. *See id*, at 74. This formulation is less strict than the tort "but for" cause standard. In torts, substantial likelihood will not suffice; a plaintiff must show that its injury absolutely would not occur "but for" the allegedly tortious conduct.

I think that a showing of "a reasonable possibility of a causal relationship" and *more* was made below. Therefore, I believe that the second prong of the injury-in-fact requirement was met, and that the plaintiffs have the required standing to bring this action.

of the plaintiffs. It was found by the district court to exist, and for standing purposes this finding is entitled to great weight. The plaintiff could not suffer this injury which was found to exist by the district court "but for" the Bureau's challenged action. Thus, the causation requirement under the first formulation is necessarily met.

The Census Bureau's differential undercounting is also the proximate cause of the plaintiff's injury. It is true that the undercount is not the direct cause of the state's malapportionment.[6] However the Michigan legislature's redistricting decision is not an intervening cause since the legislature's use of the defective figures is not an unforeseeable consequence of the Bureau's actions. The parties do not dispute the fact that in its history Michigan has never failed to use federally supplied sub-state population figures. Moreover, the Bureau should know that in recent American history the states have almost invariably used federally-supplied figures

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[6] The direct cause or most "immediate cause" of the plaintiffs' claimed injury is concededly the decision of the Michigan legislature to use unadjusted federal census figures for state reapportionment. But this does not mean that the Bureau's actions are not also a cause of the injury. Although Lord Bacon stated that the common law "contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree." Smith *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 106 (1911) that has long ceased being the case. *See* Prosser, supra at 246.

The decision of the Michigan legislature to use federal census figures is an act which occurs between the time that the Bureau supplies unadjusted figures and the time of plaintiffs' injury. Therefore, the Bureau's act is an indirect cause. But under tort law this alone would not eliminate the Bureau's actions as a cause. If this is not the result in tort law then surely it cannot be the result in the law of standing. *See* note 4 *supra*.

for reapportionment.[7] In addition, the Bureau should have been aware of the fact that if the state chooses not to use the federally-supplied figures it would have to use data at least as accurate as that supplied by the Burea. *See Burns* v. *Richardson*, 384 U.S. 73 (1966). Michigan has no already established bureaucracy to gather such data and perhaps has neither the financial or technical capacity to do so. In fact, since 1959 state law has provided that the state and substate totals of the federal decennial census shall be used by the State of Michigan for all election purposes.[8]

For the reasons outlined above, it is certainly foreseeable that the state would reapportion on the basis of the inaccurate figures. Therefore, any loss of state representation suffered by the plaintiffs is within the scope of the foreseeable risk created by the Bureau's failure to accurately count minorities. Accordingly, the

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[7] The government points out that Hawaii apparently does not use federally supplied sub-state totals for state reapportionment. *See* Reply Brief For the Appellants at 5 n.7 (*citing* Congressional Districts in the 1970's. Congressional Quarterly 1973 at 51) However, there is no question that this is a very unusual state practice. *See* Note, *Demography and District; Constitutional Issues of the Federal Census.* 94 Harv. L. Rev. 841, 861 (1981) ("in practice, most states will probably use unadjusted figures, if those are the data supplied by the Census Bureau.") It is so unusual that the Bureau must expect and be able to foresee that in almost every instance its sub-state totals will in fact be used by the states for reapportionment.

[8] MSA § 2.212(22), MCLA § 8.3(v) reads as follows:

> The population of the state or any political division thereof shall be determined, unless otherwise specifically provided, on the basis of the latest federal decennial census preceding the time as of which the population is to be determined.

Bureau's action has to be a cause of the injury and plaintiffs have standing to challenge the conduct.

The majority finds that the decision of the state legislature to reapportion on the basis of federally-supplied totals breaks the chain of causation between plaintiffs and the Bureau because as "[a]n independent third party, the Michigan state legislature would play a necessary role in determining the effects of the census upon plaintiffs." I think this rationale misses the point. The state legislature's action would certainly be necessary in order to create the plaintiffs' injury, but this fact does not mean that other concurrent causes are not present as well. If plaintiffs injury would occur "but for" the Bureau's differential undercounting, then in my view the undercounting is a concurrent cause of the injury and the causation requirement is satisified.

However, if "but for" causation is not enough to establish standing here, then certainly proximate cause does. If the Bureau could reasonably foresee that the state legislature would use the figures in such a way as to cause the claimed injury to the plaintiffs, then the actions of the state — even if it is an independent party — cannot break the chain of causation.

Recent decisions support my view of the causation requirement's application here. In *Duke Power Co.* v. *Environmental Study Group, supra,* the district court discerned a "but for" causal connection between the existence of the Price Anderson Act, the construction of nuclear power plants in the country, and the adverse consequences alleged by the plaintiffs. The petitioners challenged this finding of causation on two grounds in the Supreme Court: (1) that the particular nuclear power plants in question would have been constructed by private companies without the Price Anderson Act's

limitation on liability; and (2) that if Congress had not passed the Price Anderson Act it may well have chosen to pursue the nuclear program as a government monopoly — as it had done from 1946 to 1954. The Supreme Court rejected both contentions. It held that industry testimony at Congressional hearings on the passage of the Act indicated that the industry would not develop nuclear power facilities without a limitation on liability. In addition, it rejected the contention that the Price Anderson Act was not a "but for" cause of any adverse consequences to the plaintiffs since the government would have undertaken development of nuclear power on its own. It held that "[w]hatever the ultimate accuracy of this speculation, it is not a response to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring the appellees, and that their participation would not have occurred *but for* the enactment and implementation of the Price Anderson Act." *Id.* at 77-8. (emphasis added)

In *Duke Power*, "but for" causation was met because the claimed injury of the plaintiff could not have occurred without the presence of the Price Anderson Act. In this case, the plaintiffs' injury would not occur without the defendants' differential undercounting of minorities. Therefore, causation for purposes of standing has to be present in the instant case as well.

In *Duke Power*, the direct cause of the plaintiff's injury was the decision of the private utility companies to construct the nuclear power plants at issue. The effect of the Price Anderson Act was one step removed. Nevertheless the Supreme Court found a causal nexus between the operation of the Price Anderson Act and the claimed injury of the plaintiffs as I have previously

mentioned, an act does not have to be the last in a "string of acts leading to the [plaintiff's] injury" in order for it to be a "but for" cause. *See* F. Harper and F. James, *supra* at 11. The sole issue is whether the injury would have resulted without the occurrence of the act. In this case, the defendants' challenged action is not the direct cause of plaintiffs' injury. However, as in *Duke Power*, the plaintiffs' injury would not result without the occurrence of the defendants' challenged conduct. Thus, causation sufficient enough to establish standing is present even though the defendant's action is not a direct cause.

The Court in *Duke Power* did not specifically address the issue of intervening causation. But, it is clear that construction of nuclear plants and the resultant injury to the plaintiffs were foreseeable results of passage of the Price Anderson Act. This is evident because the Court did not find that the decision of the companies to construct nuclear power plants was an intervening cause that broke the chain of causation between the Price Anderson Act and the claimed injury. The company argued that in the absence of the Act, the government might have constructed such plants on its own or that private companies might have raised the necessary funding under an alternate scheme. However, the Court ruled that prior cases did not require "a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *Id.* at 78. The same analysis applies here. In order to demonstrate traceable link from the Bureau's actions to their clai injury, the plaintiffs should not be required to negate the "speculative and hypothetical possibilities" that Michigan might: (1) change its long standing law requiring the sole use of federal census

totals; and either (2) develop the capacity to conduct an *accurate* state census or (3) develop the capacity to make accurate adjustments of federal census data. The decision of the Michigan legislature to use raw federally-supplied sub-state totals is a foreseeable consequence of the Bureau's supplying of those figures. Thus, as in *Duke Power*, there is no intervening causation present.

The case at bar is distinguishable from *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). In that decision, the Supreme Court found that § 501(c)(3) of the Internal Revenue Code was not the cause of the plaintiffs' failure to receive free emergency medical treatment from the defendant hospital. The Court noted that: "It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 43. In other words, § 501(c)(3) was not a "but for" cause of the claimed injury and plaintiffs necessarily had no standing to bring the action. As previously discussed, that is not the case here; differential undercounting is a cause of the plaintiffs' injury.

Simon apparently provides the basis for the majority's invocation of intervening cause analysis in this case. In *Simon*, the Supreme Court did state that "Article III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, *and not injury that results from the independent action of some third party not before the court*." 426 U.S. at 41-2. (emphasis added) However, since § 501(c)(3) was not even a "but for" cause of the plaintiff's alleged injury, the Court did not have to explain when for standing purposes an injury is caused by one precedent and not by another. It is extremely doubtful that the

above language in *Simon* precludes concurrent causation in the law of standing.[9]

I think there can be no dispute about the fact that the Census Bureau's differential undercounting is a concurrent cause here. Accordingly, for the reasons discussed above, I would find standing for the plaintiffs to bring this action.

B. Ripeness

The majority correctly outlines the Ripeness doctrine. Unfortunately it misapplies this doctrine, just as it misapplies standing. The majority holds that it would be better to wait until the Michigan legislature acts on reapportionment because only then would the issues here be particularized enough for judicial resolution. I disagree. I think the court's invocation of ripeness as a reason to reverse the district court amounts to another smokescreen to justify ducking important questions. The issues presented by this case should be decided now.

First, for reasons outlined above, I cannot agree with the majority's statement that "[h]eightened public sensitivity to the problems of census undercounts makes

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[9] *See* Note, *The Supreme Court, 1975 Term, supra*, 90 Harv. L. Rev. at 209 n.31 ("The Court states that a federal court cannot act to 'redress . . . injury that results from the independent action of some third party . . .' To the extent that this implies that plaintiffs must prove that defendants' actions were the *sole* cause of plaintiffs' injury, it is certainly an incorrect view of causation as an element of a cause of action.") (citations omitted)

Should the Court decide to adopt an intervening cause formula for standing, it is reasonable to expect that this formula will conform with pre-existing notions of intevening cause. *See* text accompaning note 5.

past reliance on census figures an uncertain predicator of future legislative action." The court speculates that the Michigan legislature will depart from its invariable past practice and either adjust federally-supplied census data or use their own data for reapportionment. For the reasons outlined above, I see no reason to believe this will occur.

Second, there is no reason to defer to the judgment of a legislative body in this case. The key questions pertaining to the merits of this case are: Is there a differential undercount? Can it be corrected? To answer these questions requires the analysis of expert testimony. If the expert testimony shows that there is an ascertainable differential undercount which can be corrected, there is but one permissable conclusion — it must be corrected. A state legislature has no more expertise than a court does in this area, and it is neither necessary nor proper to refer this case to the Michigan legislature so that it can give us its advisory opinon on these questions.

In fact, I think that the Michigan legislature is not the proper forum for the issues presented by this case. A proposal in the Michigan legislature to correct census figures would provoke a heated controversy, in which the citizens of Detroit and the citizens of other areas suffering high differential undercounting would be politically handicapped. Their strength and representation in the legislature is directly weakened by the very phenomenon at issue — differential census undercounting. The net result of legislative consideration of this issue is likely to be a decision dictated by politics and not dictated by objective appraisal of the expert demographic testimony. It would probably be too much to expect state representatives from areas which have

benefited politically from differential undercounting to in effect vote themselves out of office and increase the representation of the citizens of Detroit. The Supreme Court recognized this problem when it held in *Baker* v. *Carr*, 369 U.S. 186 (1962), that the protection of the Constitutional right of equal representation could not be left solely to the legislatures. Because the vindication of this most important of Constitutional rights is a responsibility of the courts, I think we cannot put off a decision on the merits here.

Third, and finally. I think that failure to rule now will cause hardship to both parties and to the public interest. The issues presented by this case, are too important. Avoiding these issues as the majority does will not make them go away. At the most, all that the majority opinion does is temporarily change the forum — from federal court to the Michigan legislature. The Michigan legislature will then have to decide whether to adjust the census figures, and, if so, by how much. Regardless of what decision the legislature reaches, someone will be unhappy with it. We can be assured that if the Michigan legislature fails to adjust the census figures, or adjusts the figures only slightly, that the plaintiffs will then return to federal court. But the majority is in error in its assumption that the litigation will end if the Michigan legislature grants relief to the plaintiffs and adjusts the census figures in a manner acceptable to them. If the Michigan legislature does makes an undercount adjustment, it is certain that disgruntled voters and/or elected officials will promptly run to federal court and file a challenge to the adjustment. The stakes involved are high, and any adjustment must meet the standards outlined in *Wesberry* v. *Sanders, supra*, and its progeny. As a result, there is every incentive for affected persons,

i.e., those residing in areas containing relatively few minorities, to challenge any adjustment.[10]

Thus it is clear that the issues presented by this case will require judicial resolution sooner or later. The majority prefers later. Unfortunately, this will cause great hardship to all concerned. If a federal court disagrees with the state's reapportionment determinations, the court will have to order reapportionment using the census figures it has determined are appropriate. The time, effort and money involved will be greater at that later date than now.

Given the political considerations discussed above, I think there is a significant risk that a court's undercount determination will differ from the Michigan legislature's. As I have said, if this happens there will be hardship to all concerned. Moreover, there will exist tremendous and unacceptable uncertainty regarding electoral boundaries until the undercount issue is resolved.

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[10] The situation here is analogous to that presented by a voluntary affirmative action plan. Before the Supreme Court's decision in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), an employer faced an impossible dilemma if it considered an affirmative action plan to remedy its possible past discrimination. If it failed to remedy past discrimination, it might face lawsuits from minority employees who might have been discriminated against. However, if the company initiated an affirmative action plan, it might face lawsuits from white workers. *See Weber* v. *Kaiser Aluminum Co.*, 563 F.2d 216 227-39 (5th Cir. 1977). (Wisdom, J., dissenting). In order to help solve the employer's dilemma, the Supreme Court in *Weber* established a zone of reasonableness. *See DPOA* v. *Young*, 608 F.2d 671 (6th Cir. 1979) *cert. pending*.

Unfortunately, there is no *Weber* decision in the reapportionment area. As employers have faced discrimination and "reverse discrimination" lawsuits, so state legislatures will face reapportioment and "reverse apportionment" lawsuits.

In sum, the issues presented are ripe and should be resolved now. It is unlikely that the Michigan legislature will change things or that its deliberations will be helpful to us. Most important, no matter what the Michigan legislature does, we will have to decide the issues presented by this case anyway. There is simply no reason to delay a decision on the merits. On the contrary, I think that it is the height of folly not to decide this case given both the importance of the issues and the problems engendered by postponing a decision.

II.

As previously stated, the district court below ruled that the defendants must adjust their national state, and sub-state census totals for 1980 to correct the differential undercounting of blacks and Hispanics. The court also ruled that the defendants could select at their discretion any available methods of adjustment "so long as they [the methods] are statistically defensible." These rulings are based on sound legal principles and are supported by the evidence at trial. However, new data released since the entry of judgment against the defendants leads me to the conclusion that the case should be remanded to the district court for further fact-finding, since this information was not available to the court at the time it reached its decision.

A.

I think that the district court's formulation of the law governing this controversy is unassailable. Simply stated, the court held that the Secretary of Commerce and the Bureau of the Census are bound by the Constitution

to conduct the decennial census as accurately as possible. This holding follows from the Supreme Court's recognition in *Baker* v. *Carr*, 369 U.S. 186 (1962), of the constitutional right of equal representation — that one citizen's vote should not weight [*sic*] any more or less heavily than another citizen's vote. Later, the Supreme Court went on to hold that equal representation requires that the apportionment of representation in the United States House of Representatives and in the state legislatures must be based "as nearly as is practicable" on precise mathematical equality. *See Wesberry* v. *Sanders*, 376 U.S. 1 (1964) and *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

It goes without saying that unless the population base for reapportionment is accurately determined, there can be no such precise mathematical equality between voting districts. If an inaccurate enumeration takes place, then some voting districts by virtue of differential undercounting would contain more persons than others.[11] In these circumstances, the deleterious effect on equality of representation might be as serious as any that would occur from gerrymandering. *See* Note, *Demography and District: Constitutional Issues and the Federal Census*, 94 Harv. L. Rev. 841, 860 (1981).

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[11] If the Bureau undercounted segments of the population in an equal fashion, then census undercounting would create no equal representation problem. Each voting district would be undercounted to the same degree, and the relative strength of each citizen's vote would be unaffected by the undercount. The differential undercounting alleged here, on the other hand, dilutes the strength of those citizens who reside within voting districts with higher numbers of blacks and Hispanics since the elected representatives of these districts actually represent more people than do the elected officials of other districts.

Since the sole constitutional function of the decennial census is to provide a population base for reapportionment of Congressional districts,[12] the Census Bureau is bound by the Constitution to count people as accurately as possible.[13] Otherwise, the promise of *Baker* v. *Carr* would, in my opinion, be rendered a teasing illusion.

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[12] Article I, Section 2, Clause 3 of the Constitution provides:

> Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

[13] The Constitution requires the Secretary of Commerce and the Census Bureau to supply accurate national and state census figures. It does not require the Secretary or the Bureau to supply sub-state totals to the states for reapportionment of Congressional districts within the state. However, 13 U.S.C. § 141(c) requires the Bureau to do so. Since national and state totals are compiled by adding up sub-state census totals, it is obvious that the state or national census figures can be no more accurate than the local figures. Thus, the Bureau is necessarily bound by the Constitution to make its sub-state population totals as accurate as possible. It is bound by the statute to distribute these "accurate" figures to the states.

In addition, since "one man, one vote" is the law of the land, an accurate population base for reapportionment is necessary. The Census Bureau in virtually every case provides the data base for reapportionment. Thus, I believe that *Baker* v. *Carr*, 369 U.S. 186 (1962), and its progeny provide additional direct support for the Bureau's duty to provide accurate census figures.

B.

The district court found that the Secretary of Commerce and the Census Bureau did not conduct the 1980 census as accurately as possible since they did not adjust the final tally to correct for the differential undercounting of blacks and Hispanics. The court found persuasive the plaintiffs' expert testimony which established that there has been a perennial differential undercounting of blacks and Hispanics. In fact, testimony by Dr. Philip M. Hauser, University of Chicago Professor of Urban Sociology and former Acting Director of the U.S. Census Bureau, established that under the original Constitution "the slaves [in 1790 were] . . . counted as three-fifths of a person, but [now almost 200 years later] the black male twenty-eight years of age counts as 78 per cent of a person."[14] The district

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[14] As the majority notes, the Bureau estimates that it undercounted 7.7% of the blacks in 1970 and only 1.9% of the whites. But significant differential undercounting of black people has occurred throughout the history of the federal census. *See* R. Hill, *The Synthetic Method: Its Feasibility for Deriving the Census Undercount for States and Local Areas* (paper prepared for the Conference on Census Undercount, Feb. 25-6, 1980) *reprinted in* Appendix, at 1628. In 1870, 9.5% of blacks were uncounted, while 1.9% of the white population was not counted. Estimates for that year indicated that 41.9% of all the persons uncounted that year were black. *Id.* in 1920, 1930, and 1940 blacks were undercounted at the rate of 15.2%, 12.5% and 12.7% respectively. The white undercount, on the other hand, ranged from about one to less than three percent during those years. H. Alterman, Counting People: The Census in History 279 (1969). In 1950 and 1960 the black undercont was much greater than the undercounting of whites. *Id.* at 80-81.

Hispanics have experienced a similar history of differential undercounting in the federal census. Exact figures on the nature and extent of this undercounting in past censuses are not available, but

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court also found that the extent and nature of this differential undercounting could be accurately determined,[15] and that the state of the statistical art allowed the Census Bureau to impute into the

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the government does not dispute the fact that significant undercounting has occurred. The district court found that "almost as large a percentage of Hispanics have been undercounted" as blacks. 497 F. Supp. at 1318.

The expert testimony below established that a long history of faulty census questionnaires, language difficulties, as well as poverty, antagonism, lower education, and demographics have led to significant differential undercounting in the Hispanic community. *See* note 1 *supra*.

[15] The plaintiffs' expert witnesses testified that because the "cluster of characteristics" in the nation's black community has not dramatically changed since 1970 the rate that blacks are differentially undercounted should not change much, either. On direct examination, Dr. Hauser testified as follows:

> Q. Dr. Hauser, if in 1970 we had an undercount of 2.5 per cent, then why do we have an undercount of this magnitude?
>
> A. I think the answer is complex. It is due to a number of factors, including the following. One, we have a very large nation with over 3,000,000 square miles with very uneven distribution of population by a region, difficult to find. Second, and probably even more important, we have had tremendous differences in the social and economic status of our citizens and especially members of minority groups. This would include the blacks, Hispanics, and other groups. Blacks and Hispanics are the largest of this minority group. Third, we have had the factor of leadership, public opinion makers, including Congressmen, Senators, candidates for the President, all of whom generate attitudes that affect the citizen in his relationship to his government. And fourth, you have the citizen himself in a country such as ours where in an unparalleled fashion every citizen has the right to tell his government to go to hell, and many exercise that right, and particularly under the influence of a leadership which

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final census tally the number of persons missed during the headcount.[16] According to the testimony, statistical adjustment would yield a more accurate estimate of the number of persons within the United States than would result from current Bureau counting procedures.[17]

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encourages this attitude. Now it is the interaction of all these factors, plus one other, to which I have referred in a specific instance. The changing composition of the population. If there is an increase in the proportion of the population that is most difficult to count completely, then there is an increase in the undercount.

Q. Is that situation occuring for 1980?

A. In 1980 these factors are all operative. The interaction and net effect of these is still to be determined. There are number of factors that, all other things being equal, would tend to decrease the undercount, but there are also a number of factors operating which would tend to decrease the undercount and the net effect of this is not known to anybody at this time. App. 402-3.

Regarding the Hispanic population, Dr. Hauser testified as follows:

Q. You have explained how, through matching studies, it would be possible to obtain an estimation of the Hispanic undercount at the national level?

A. Yes.

* * *

Q. Assuming that the Census Bureau was unable to complete matching studies to determine the Hispanic undercount, but did have the black undercount through demographic analysis, in your opinion would it be reasonable to assume that the Hispanic undercount was substantially the same as the black undercount?

A. Well, if you had nothing else to go by, this is one judgment that could bring the statistics closer to the truth than the unadjusted data. In my judgment, yes.

Q. Would it also be reasonable, in light of what you have said, to assume that the Hispanic undercount was intermediate between white and black, but closer to black?

A. That is another judgment, as to between these judgments, nobody would have a definitive answer as to which was the better judgment.

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Because the trial occurred before release of preliminary 1980 census data, the expert witnesses below based their testimony on data derived from past censuses and from projections of 1980 census results.[18] The parties did stipulate that there would be an undercounting of

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Q. In your opinion, from a demographic standpoint, would either judgment be a reasonable one?

A. Well, in light of what we know about the characteristics of the predominant proportion of the population of Hispanic origin, I would say either judgment would have some justification and some reason, and either one could conceivably bring the number closer to the truth than the unadjusted data. App. at 418-20.

Dr. Hauser testified that in his expert opinion the recent coverage improvement initiatives of the Census Bureau would create no net improvement in the differential undercount rate:

Q. By factors that would tend to increase the undercount, are you referring to the coverage improvement plans of the Bureau?

A. Well, factors — this would tend to decrease the undercount.

Q. Decrease the undercount?

A. Decrease the undercount. The Bureau has spent more money and procedures to try to minimize the undercount at this time than in any previous census. These would tend, if successful, would decrease the size of the undercount.

Q. I believe you indicated earlier that because of demographic considerations, there are, in other words, approximately 2,000,000 people likely to be undercounted if there is no improvement in coverage?

A. About an extra million or more by reason of just the increased proportions of blacks and increased proportion of hard-to-find youth, who are there because of the post-war baby boom.

Q. So that in lieu of that, is it possible that the coverage improvement features will be offset by this and so will not have any net effect?

A. Well, this and other factors of the type to which I referred. Remember this, a third of all blacks live in poverty by the government standards. Twenty-seven per cent of Hispanics live in poverty by government standards. The combination of their

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persons within the United States in 1980, and that the Bureau would undercount blacks and Hispanics at a higher rate than whites.[19] However, there was no stipulation as to the rate of this differential undercounting for 1980.

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socioeconomic status, residences which are often of substandard quality, hard to locate, residential patterns of occupancy which make it very difficult to find seperate households within cramped quarters, converted structures, some legally converted, some illegally converted that the socioeconomic station of our minority groups is such that by reason of that status and other research by the Bureau tends to support this, that they are difficult to count. App. 403-5.

[16] *See, e.g.*, the testimony of Dr. Robert Hill, App. 507-10; the testimony of Dr. Taeuber, App. 631-2; and the testimony of Dr. Hauser, App. 424-5, 444-5.

[17] For example, Dr. Hill testified in part as follows:

Q. Sir, do you have an opinion as to whether or not an adjustment of the 1980 Decennial Census to include the undercount would permit population totals based on the techniques that are available to the mathematical and statistical and demographic communities to arrive at population, corrected population totals, that are closer to the truth than the numbers that would be obtained from the counts?

A. I do have an opinion.

Q. What is that opinion, sir?

A. I do believe that the population estimate as derived by the demographic procedure at the national level will yield more accurate court of the population than will be derived by the enumeration procedures of the Census Bureau.

Q. Do you have an opinion as to whether there are techniques to distribute that undercount from the national level into the local areas so that the local areas which have population counts that are corrected would have counts that would be closer to the truth when comparing to those population counts that were not corrected?

A. Yes, I do have an opinion.

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The only way to determine actual differential undercounts is to compare the census headcount with demographic estimates of the nation's true population. As the majority notes, the Census Bureau argues on appeal that it cannot determine the actual differential

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Q. What is that, sir?

A. I believe that, first of all, in terms of the state of the art at this time, that the demographic analysis yields the most accurate measure of the undercount at the national level. By utilizing the synthetic method for deriving estimates of the undercount for states, I think it is an extremely reliable procedure for deriving estimates of the undercount for states, so that by taking what I did from the Census Bureau demographic estimates at the national level, one can then derive reliable estimates of the undercount for states.

Q. How about below the state level?

A. Well, now here I think that there are several options that are available. One is that I also believe that one can derive reliable estimates below the state level, but clearly demographic analysis tells us several things. one is that there is an inverse relationship with reliability and size of place, so that we would expect that the smaller the area, we will have greater error in the estimates that we are deriving. But I think for many large metropolitan areas you could use the synthetic method for being able to derive those. So I think that it can be used. There is another procedure which is what the Census Bureau has been using, which I think is a viable option, and it was particularly used in their [*sic*] where you counted procedures, where what you have in effect, if you take the state totals that are derived by the synthetic method, you can therefore, according to the procedures that they use and when you count it, you have a number of —

Q. (Interposing) Where you counted?

A. Where you counted, the similar procedure, the imputation procedures they used for those.

Q. In 1970?

Q. Do you have an opinion, if they used a synthetic method, taking the national undercount rates by race and applied the synthetic method from — down to the national level and to local areas to the degree that they have to report to the state on April

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undercount for 1980 because of the presence of large numbers of illegal aliens within the United States. Preliminary 1980 census figures released after the trial below show that the Bureau has counted approximately 226 million people. Since earlier demographic studies

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1st of 1981 for Congressional apportionment purposes that those numbers, just using a synthetic method alone, whether or not the corrected totals for the undercount would be on the average closer to the truth than the population totals that were not corrected?

A. I do have an opinion.

Q. And what is that?

A. It is that those estimates would be closer to the truth than unadjusted population counts for areas on the average.

Q. Would that be true for a significant proportion of the areas that were adjusted.

A. Yes, it would be true for the significant proportion of the areas that were adjusted.

Q. Would there be areas where there is a possibility that an adjustment for undercounts in some percentage slightly less accurate than the unadjusted population counts?

A. I would think that there would be, but I think that there would be a very small minority.

Q. Now with regard to using the synthetic method just for distributing population down to the local levels for apportionment purposes, with regard to the relative proportions, do you have an opinion as to the degree of reliability that would grow out of that type of an undercount adjustment?

A. Yes, I do have an opinion.

Q. What is that?

A. I think the real virtue, frankly, of the synthetic method is that in addition to giving you reliable estimates in an absolute sense, it is even much more powerful in giving you reliable relative proportions of the count relative — places in relation to each other which is the basis for apportionment.

Q. Explain to the Court what you mean by relative apportionment?

A. What I mean is the synthetic method would give you some estimates for areas. Now the real significance is not in some cases what those may be in their absolute numbers, although that is

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indicated that about 226 million people would be within the United States on April 1, 1980, the preliminary census data on the 1980 headcount substantially equals the available demographic estimates.[20] Thus, the defendants asserts that no statistical adjustment of the 1980 headcount is possible since there are no available means to measure how many illegal aliens have been counted. They conclude that there is no way to determine how many blacks and Hispanics were missed in the 1980 headcount.

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part of what you would derive, but even more significant is that you would consistently get estimates that were in the proper ordinal relationship to each other, that those places that in many cases we suspect would tend to have higher undercount rates because of these factors that we are talking about, would, by repeated different measures, would yield estimates higher than those that one would tend to have less of those characteristics, so that you would be able to distribute your entire population for a state in very reliable terms for any boundary distribution or what have you using the synthetic method.

[18] The original complaint in this case was filed on Census Day, April 1, 1980. Testimony was heard during August of 1980, and the district court opinion and judgment for the plaintiffs was issued on September 25, 1980. The release of significant amounts of data concerning the actual 1980 population count was not available until later. However, by October 27, 1980, preliminary field count figures were available for areas where 95 percent of the U.S. population resides. *See* Report of the United States Bureau of the Census to the Judgment of the Court 2 *reprinted in* Appendix at 122.

[19] The relevant stipulation reads as follows:

The parties hereby stipulate the following facts are true:

A. In the taking of the 1980 decennial census, there will be a census undercount, in that all of the persons actually residing in the United States on the census date, April 1, 1980, will not be enumerated as part of the 1980 decennial census.

B. In the taking of the 1980 decennial census, it is likely that there will be a differential of completeness for blacks and Hispanics when compared to whites.

Final Pre-trial Order, para. 3, at 3, *reprinted in* Appendix at 61.

In its recitation of the facts, the majority seems to accept the Bureau's analysis as true.[21] However, the plaintiffs' have not had an opportunity to rebut the Census Bureau's analysis since the plaintiff's experts testified before the release of the preliminary 1980 census data. It is for this reason that I would remand this case

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[20] At the time the Bureau filed its Post-Trial Report, its preliminary field count for the nation as a whole showed 225,590,000. By then, it was "increasingly confident that the final [head]count (would) . . . exceed 225 million and approach 226 million." Pre-censual estimates of the actual 1980 population projected that about 221,672,000 persons would be within the country at that time. Post-Trial Report, at Appendix 129-33. This latter figure contained no "allowance for undernumeration in the previous Census." *Id.* at 130.

[21] I am suprised by how apparently willing the majority is to accept the Bureau's *ex parte* post-trial analysis. This stands in sharp contrast to the majority's silence regarding the district court's findings of fact after trial. The district court's findings are supported by substantial evidence and are not clearly erroneous. In fact, the government has never challenged the district court's findings on appeal. The government's main brief argued only that 1) the plaintiffs lacked standing, 2) the Bureau's decision to base the census on an actual enumeration was rational and not arbitrary, and 3) the district court abused its discretion in ordering injunctive relief. In its reply brief, the government, while arguing that no statistically defensible adjustment method exists, takes a curious position. It states:

> In addition, at a number of places in their brief, plaintiffs claim that we cannot or do not dispute the findings made by the district court. As noted in our introduction, this claim is false. As we show below, the district court never should have reached these factual conclusions in the first place. Consequently, we attack them by demonstrating that the record proves that the Census Bureau conducted the census in a rational manner. Therefore, it is unnecessary for the Government to argue that the findings were clearly erroneous. Gov't *Reply* Brief at 14-15.

As I note, I do not think that the district court applied an incorrect legal standard. Even if it did, however, the underlying factual findings are still subject to the clearly erroneous rule. Accordingly, the government's attacks on the feasibility of adjustment must be tested under this rule. It is disingeneous for the government to snipe at the district court's findings while claiming that it does not have to challenge them as clearly erroneous.

to the district court for further fact-finding. If the plaintiffs can show that there are available methods to measure the differential undercounting of blacks and Hispanics, then the district court's conclusion is correct — statistical adjustment to correct the differential undercounting is feasible. I think the plaintiffs should have this opportunity. They should be allowed to submit additional evidence on remand, particularly in view of the evidence introduced in *Carey* v. *Klutznick*, 508 F. Sup. 420 (S.D. N.Y. 1980) which indicates that there may be ways to accurately measure the 1980 undercount.[22]

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[22] Evidence introduced in the *Carey* v. *Klutznick* trial apparently contradicts the Burea's conclusion that there are no available methods to measure the 1980 undercount. The trial court found:

> While the "measured undercount" for the nation has been reduced to almost zero by the latest estimates, the Census Bureau has no evidence that there has been a decrease in the differential undercoverage of the groups that traditionally are "hard to enumerate." There is, however, evidence from independent surveys that the populations of New York State and New York City which contain relatively large numbers of the "hard to enumerate" were undercounted in 1980 in differentially high proportions to that of the nation as a whole.
>
> Conservative estimates of the undercount in 1980 for New York City ranged from 517,000 to 650,000 and for New York State ranged from 772,000 to 905,000. Plaintiff's Ex. 235 at ¶ 19. The results of a random phone survey of New York City and New York State residents conducted between August 20, 1980 and September 11, 1980 by the independent public affairs research organization, Penn & Schoen, indicate that 6% of the population of New York State and 8% of the population of New York City have not been counted by the Census Bureau. While the defendants have challenged the reliability of this survey I find that it is entitled to some weigh [*sic*] in demonstrating the magnitude of the undercount in New York.
>
> Other evidence of the undercount in New York are the results of "Were You Counted Campaigns" in New York City and

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Accordingly, I would remand this case to the district court.

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Rochester. The results of the New York City "Were You Counted" campaigns show that 18,109 or 11.2% of the 161,718 applicants or recipients interviewed by 41 Income Maintenance Centers, 8 recertification offices and 16 non-public assistance Food Stamp Offices of the New York City Human Resources Administration had not been counted. A mail survey conducted of all 302,000 households in the New York City Income Maintenance Program indicated that of the 281,130 households that responded 217,325 stated that they had returned a census form or were visted by a census taker, 41,175 did not answer the question and 22,270 or 8% of the respondents stated that they did not return a census form or were not visted by a census enumerator.

Defendant's have submitted a preliminary report on the processing of "Were You Counted" forms for New York City. The results indicate that 9,796 or approximately two-thirds of the 15,158 individuals who claimed they were not counted lived in households from which the Census Bureau had already received a mail questionnaire or a field return questionnaire showing an equal or greater number of persons. Of the remaining one-third or 5,362 persons, 83.04 percent of the individuals contacted by the Census Bureau were found to have been missed by the census. Of 2,123 persons contacted by the Bureau 1,763 were added to existing census figures. If the 3,239 individuals who were not contracted by the Census Bureau are deemed to have been missed at the same rate as persons already reached by the Bureau, this would result in the addition of 2,688 (83% of 3,239) individuals to existing census counts. The total figures would then reveal that of 15,158 individuals who claimed they had not been counted, 4,451 or 29.4% were in fact not counted. Of course, many more individuals have submitted "Were You Counted" forms in New York City and approximately 30 percent of that population were most likely missed by the Bureau.

In the City of Rochester "Were You Counted Campaign," 7 to 10 percent of those contacted stated that they had not been enumerated. Of those who claimed they had been missed by the Census Bureau, approximately 60% were verified by the Census Bureau as not having been enumerated. 508 F. Supp. 420, 428.

OPINION

United States District Court
Eastern District of Michigan
Southern Division

(Entered May 29, 1980)
No. 80-71330

Young v. Klutznick, 497 F. Supp. 1318.

This matter is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment. The court has reviewed and fully considered the briefs and affidavits of the parties relative to these motions and, on May 19, 1980, entertained oral arguments. For the reasons set forth below, defendants' motions are denied.

Plaintiffs, Coleman A. Young, individually and as a registered voter of the City of Detroit and as Mayor of the City of Detroit, and the City of Detroit seek declaratory and injunctive relief against the Secretary of Commerce, Philip M. Klutznick, and the Director of the United States Bureau of Census, Vincent P. Barabba, to require them to adjust the population figures derived from the 1980 decennial census to reflect an expected undercount.

More specifically, plaintiffs allege that in the past and predictably in the future the manner in which the Bureau of Census goes about determining the number of people who reside in the United States on a particular day each ten years results in missing a great number of people. They contend that a disproportionate number of these individuals missed in the so-called "head count" are

blacks and minorities who reside in urban areas such as Detroit. Plaintiffs point to the 1970 census figures as illustrative of the potential problem with the 1980 figures. In 1970, by the Census Bureau's own estimates, approximately 10.2 million people were not personally contacted during the head count, which represents 2.5 percent of the population. The Bureau estimated that 1.9 percent of these people were white and that 7.7 percent were black. Of this 10.2 million, 4.9 million people who were not actually counted were included in the official count by "imputation" and allocated among the states for purposes, *inter alia* of apportioning congressional seats. Still, approximately 5.3 million people were not included in the 1970 census figures. As a result, plaintiffs contend that individuals, such as plaintiff Young, who reside in urban areas with a high black population will be deprived of their right to equal representation in the House of Representatives of the United States and the right to have their vote for members of the House weighted equally, in relation to the representation and weight of votes for other residents and voters in Michigan. Plaintiffs also contend that they will be under-represented in the State Legislature to the extent that the inaccurate census figures are used as the basis for apportionment of the state senatorial and representative districts. Finally, plaintiffs assert that more than 100 federal funding programs are tied in one way or another to the census figures and that, as a result, areas such as Detroit will not receive federal funds in proportion to its actual population. Plaintiffs suggest, however, that statistical and demographic techniques can be utilized by the Centus Bureau to supplement the personal count and thus more accurately reflect the actual number of individuals residing in the United States.

Specifically, plaintiffs seek the following relief. First, that a declaratory judgment be entered to the effect that, as nearly as possible, the actual head count be adjusted to take into account the so-called undercount; that the tabulation submitted to the President reflect this adjustment; that the report to Congress reflect this adjustment; and that the official population count of cities and sub-units be a count which reflects this adjustment. Second, that a permanent mandatory injunction be entered which requires the Bureau of Census to make the aforementioned adjustments; that the official count of the states reflect this adjustment; that the official population count of the cities and sub-units reflect this adjustment; and that the mid-decade census and other collections of data reflect this adjustment. Third, that an interlocutory injunction be entered which requires defendants to take whatever steps are necessary prior to transmitting their report to the President to ensure that the data necessary to make the aforementioned adjustments will be available.

In response to plaintiffs' verified complaint and motion for preliminary injunction, defendants filed this motion to dismiss or, in the alternative, for summary judgment. In general, two grounds for dismissing the complaint are advanced: (1) lack of a justiciable case or controversy; and (2) failure to state a claim upon which relief can be granted.

JUSTICIABILITY:

Defendants assert that there is no justiciable case or controversy in this case for three reasons: (1) lack of ripeness; (2) lack of standing; and (3) lack of a concrete factual situation upon which to base a decision. These sub-issues within the general framework of defendants'

contention that this case is not justiciable will be addressed out of order but in order of difficulty and importance, beginning with standing.

Standing:

Defendants contend that plaintiffs lack standing to raise the issues presented in this complaint because they have no personal stake in the controversy and have suffered no actual injury, because their claims are abstract and speculative, and because there is no substantial likelihood that the relief requested would redress any alleged injuries plaintiffs might suffer. Defendants also assert that prudential limits on standing dictate that this case be dismissed.

The "essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' . . . As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury,' to the plaintiff . . . but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72 (1978) (citations omitted). Stated somewhat differently, the question of standing focuses on whether plaintiff has alleged an "injury in fact," economic or otherwise, and whether there is a substantial likelihood that the relief requested will redress the injury claimed. *Id* at 75 n. 20.

Addressing the second part of the inquiry first, the court believes that in this case an order requiring

defendants to take into account the undercount would benefit plaintiffs in a number of ways. First of all, if an order requiring defendants to adjust the head count to reflect the undercount were entered, it could have the effect of increasing the number of congressional representatives that are allocated to Michigan. It should be noted, however, that plaintiffs apparently do not believe that the undercount would be so large that it would require the allocation of an additional representative to Michigan and disavow any request for relief in this regard. Secondly, if the relief requested by plaintiffs is granted, voters in areas that would otherwise be subject to an undercount would have an augmented voice to the extent that the dilution of the weight of their individual votes would be translated into votes on the floor of the House. Another benefit, of course, would be that Michigan in general and Detroit in particular would benefit from more federal funding under programs tied to the census. Thus, while it is not clear now what techniques or tools can be utilized in correcting the undercount, if, after a hearing on the question, it is demonstrated that the use of those tools will result in a more accurate reflection of the population in Michigan, an order requiring the use of those techniques would result in a benefit to plaintiffs, thereby satisfying the second prong of the standing test. See, *Sharrow* v. *Brown*, 447 F.2d 94 (2d Cir. 1971).

With respect to the first prong of the standing test — i.e., whether injury in fact has been adequately alleged — the court would first observe that it is extremely difficult to reconcile many of the United States Supreme Court's decisions on standing of recent vintage. In general, however, the cases require that a "specific," "concrete," or "personal injury" be alleged. Defendants' position on this aspect of the standing inquiry is that the

injury plaintiffs allege is speculative to the extent that it may be some time after the actual tabulation of the head count that defendants will know whether or not an undercount actually occurred. Alternatively, defendants suggest that the undercount may be so negligible as to have virtually no effect on voters such as plaintiff Young whatsoever. Defendants further assert that merely alleging that it is likely that plaintiffs will suffer some injury is not a sufficient predicate upon which standing can be based. In summary, defendants make the following observation:

> At most, the "facts" establish that a "dilution" of voting rights may come into existence only if a number of conditions occur: e.g., *if* there is a population undercount in Detroit which is large relative to the undercount in other areas of Michigan and the United States and *if* there is a legislative reapportionment based on the census figures which reduces Detroit's legislative representation. As a result, these "facts" translate into *no injury* or into generalized grievances which are to confer standing.

Defendants' Brief at 16. As legal support for defendants' position on this point, they cite such cases as *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Schlesinger* v. *Reservists to Stop the War*, 415 U.S. 208 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Laird* v. *Tatum*, 408 U.S. 1 (1972); and *Federation of American Immigration Reform* v. *Klutznick*, No. 79-72609 (D. D.C. Feb. 26, 1980) (three-judge court).

Plaintiffs, on the other hand, assert that they have alleged a distinct, concrete, and palpable injury sufficient to withstand the injury in fact prong of the standing inquiry. Plaintiffs first point to general allegations in paragraph 31(a) which state that plaintiff Coleman

Young, as a resident and registered voter of the City of Detroit, has and will suffer a dilution of his voting rights. They go on to cite factual support for that claim of injury in other paragraphs of their complaint. They add that not only have they alleged a distinct and palpable injury but that that injury is by no means a generalized one. In particular, plaintiffs contend that the injury plaintiff Young suffers as a registered voter in the City of Detroit is that persons situated in other areas of Michigan in which the undercount is not as great derive the correlative benefit of greater representation and greater weight of their vote in the United States House of Representatives, all at the expense of plaintiff Young and other residents similarly situated in the City of Detroit.

In response to defendants' contention that at this point in time the allegations as to actual injury are merely speculative, plaintiffs first point out that in the context of a motion to dismiss, all well pleaded allegations in the complaint must be accepted as true. Plaintiffs also point to the fact that both the 1960 and the 1970 decennial census resulted in undercounts of blacks at four times the rate of whites. Based on past experiences, therefore, plaintiffs contend that it is certain that an undercount will occur again given the racial makeup of the City of Detroit. Finally, plaintiffs refer to Dr. Hill's affidavit which indicates that an undercount in the same proportions that occurred in the 1960 and 1970 decennial census is expected to occur in the 1980 decennial census.

A number of cases have recognized either explicitly or implicitly that allegations that there has been a dilution in voting rights are sufficient to support the injury in fact prong of the standing test. See, e.g., *Baker* v. *Carr*, 369 U.S. 186 (1962); *Schlesinger* v. *Reservists Committee to Stop the War, supra; United Jewish Organizations* v. *Carey*, 420 U.S.

144 (1977); *Creel* v. *Freeman*, 531 F.2d 286 (5th Cir. 1976); and *Locklear* v. *North Carolina State Board of Elections*, 514 F.2d 1152 (4th Cir. 1975). Perhaps the closest case to the instant dispute is *Baker* v. *Carr*. In *Baker*, plaintiffs were deemed to have standing to challenge a particular districting system set up to apportion state representatives on the basis that it impaired the relative effectiveness of their votes. The Court found that plaintiffs had alleged a sufficient injury in fact in that they had pleaded that the reapportionment scheme placed them in a position of inequality vis-a-vis voters in other counties. Plaintiffs were said to have asserted " 'a plain, direct and adequate interest in maintaining the effectiveness of their votes' . . . not merely a claim of 'the right, possessed by every citizen, to require the Government be administered according to law.' " *Baker*, *supra*, at 207-08.

Similarly, in this case, plaintiff Young has alleged that he is and will continue to be deprived of equal representation in the House of Representatives in relation to votes of other residents of the State of Michigan who live outside Detroit. He goes on to allege, essentially, that ignoring a known fact — that is, the undercount — and not taking it into account is the same as refusing to count individuals arbitrarily. Census data is used not only in determining the number of representatives that a particular state is entitled to but also for purposes of apportioning congressional districts within a state and allocating to different districts respresentatives for the state legislature. It is plaintiffs' position that this seriously impairs and dilutes the weight given to voters in the City of Detroit.

In a very recent case, however, a three-judge panel in the District of Columbia found that plaintiffs situated

similarly to those in this case lacked standing to challenge the Bureau's practice of including illegal aliens in the enumeration of "the whole number of persons" required by Article 1, § 2. *Federation for American Immigration Reform (FAIR)* v. *Klutznick*, — F. Supp. — (D. D.C. Feb. 26, 1980). In that case, plaintiffs alleged that one or more of the named plaintiffs would likely suffer the loss of at least one national or state representative and receive less in the way of federal funds under various programs if the Census Bureau continued to include illegal aliens in the census count. The court assumed, for purposes of the defendants' motion to dismiss, that counting illegal aliens was unconstitutional, a proposition not at all clear in the abstract since the Constitution does not distinguish between, for example, convicts who cannot vote, illegal aliens, infants and so forth in determining the "whole number of persons." See, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 534 (1969) ("There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2.") The Court also made other assumptions and drew certain inferences in favor of plaintiffs but nevertheless held that they lacked standing. The court concluded that the plaintiffs had failed to demonstrate that the relief requested would benefit them personally and that it would be too speculative and conjectural to find injury in fact of the basis of the allegations made.

Plaintiffs' allegations that the illegal alien population is large enough that their inclusion in the population base could cause a shift between states of between one and sixteen congressional seats, depending on concentrations in particular states and cities were found to be insufficient. The *FAIR* court found that a plaintiff's

allegation that he was "one of a group, some of whom are likely to be injured" was not a sufficiently concrete "injury in fact" which could support standing in that case. In this case, however, plaintiff Young has specifically alleged that *his* vote *will* be diluted vis-a-vis the votes of other voters residing in other areas of Michigan if the undercount is not considered as part of the population base for purposes of congressional apportionment. In *FAIR*, plaintiffs made no convincing showing that inclusion of illegal aliens in the population base diluted their right to equal representation or that the weight of their votes would be affected by the expected method of taking the census and apportioning congressional seats. Indeed, the only effect the court found to be almost certain was that if illegal aliens were not included in the population count, California would lose one or more representatives, and consequently that the alleged illegal policy benefitted that state and its voters. No plaintiff was able to show that he was the one who was actually adversely affected. The court specifically distinguished the apportionment cases in which it was clear that the voters alleging dilution of their votes would have standing:

> There is no doubt that individuals claiming that their votes are diluted because their Representative represents a greater number of constituents than do other Representatives in the same assemble [*sic*] have standing to challenge the apportionment scheme. *Baker* v. *Carr*, 369 U.S. 186 (1962). In such a case, the question is "whether the claims of malapportionment . . . are in fact made by plaintiffs whose representation would be improved if those claims are to prevail." *Ripon Society* v. *Nat'l Rep. Party*, 525 F2d 567, 572 (D.C. Cir. 1975) (en banc), *cert. denied* 424 U.S. 933 (1976). As expressed by the

> court in *Baker* v. *Carr*, assuming that the plaintiffs' allegations assert a legally cognizable injury, it is enough for standing purposes that the plaintiffs "are among those who have sustained it." 369 U.S. at 208.

Id. at 7-8.

In short, the court finds that plaintiffs in the instant case have set forth allegations in their complaint which establish, at least for purposes of a motion to dismiss, that they have or will sustain an injury in fact. More specifically, the allegations in plaintiffs' complaint, when viewed in conjunction not only with the standing cases cited by the parties but also with the substantive law as it relates to congressional districting and related matters, see, e.g., *Kirkpatrick* v. *Preisler, supra, Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); and *White* v. *Weiser*, 412 U.S. 755 (1973), establish a concrete, particularized, distinct, palpable injury which will flow from not taking into account the undercount. Accordingly, the court finds that plaintiffs do have standing at this juncture to raise the issues presented in their complaint.

Ripeness:

The ripeness doctrine seeks to preclude a federal court from deciding a constitutional dispute before it is necessary. In this case, defendants contend that the case is not presently ripe for disposition because there is no way of knowing at this juncture whether there will in fact be an undercount; if there is one, how much it will be; and assuming there is an undercount, how it can be taken into consideration prior to the Census Bureau actually completing the raw count. When queried by the court during oral arguments, defendants' attorney

admitted that while their position is that the case is not ripe at this juncture, he also conceded that it might never be ripe for disposition. In response, plaintiffs' position is that they are not asking the court to determine at this time what the undercount is or even how it should be adjusted. They merely assert that if their allegations are treated as true, as they must be on a motion to dismiss, injury will certainly flow if corrective action is not taken prior to the time the Census Bureau transmits its count to the President.

The court finds that this case is ripe for litigation at this time. In addition to the points made by plaintiffs in this regard, the court would note that the issues raised by this complaint and by defendants' own admission, are capable of repetition every ten years, yet might evade review on ripeness grounds if this court were to not assume jurisdiction. Although the "capable of repetition, yet evading review" doctrine is generally discussed in the context of mootness, see, *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); *Roe* v. *Wade*, 410 U.S. 113 (1973), the court believes that the principle has vitality in connection with the ripeness issue as well. The court would also note that merely because an injury has been threatened and not actually consummated does not necessarily deprive a court of the power to review constitutional issues. *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102 (1974); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593 (1923). In this case, plaintiffs have certainly alleged such threatened harm. The court also believes an analogy to those cases in which the Supreme Court has decided to review the constitutionality of statutes prior to their effective date has some application to the resolution of the ripeness issue. If the relief sought by plaintiffs is not granted, assuming they are entitled to such relief after a

trial on the merits, plaintiffs will be irreparably injured to the extent that they will be deprived of equal voting weight for at least ten years. *Cf. Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Finally, it would not appear that prudential considerations counsel in favor of delayed resolution of this matter. See generally, Tribe, *American Constitutional Law*, 60-62 n.6 (1978). For these reasons, the court concludes that the issues raised are ripe for disposition.

Failure to Establish a Concrete Factual Situation:

This sub-category within the general argument defendants make relative to the justiciability of this case essentially raise prudential considerations and arguments discussed in connection with the other two sub-headings. Stated otherwise, the arguments advanced by defendants do not really differ in kind from those previously advanced. For the reasons the court has previously stated, and because the court believes that it can resolve the issues raised without doing violence to well-known concepts of justiciability, the court will not burden this Opinion with an extenstive discussion relative to the points raised in defendants' brief. Suffice it to say that the court does not believe that it would be rendering an advisory opinion by deciding this case. The issues presented are not abstract or hypothetical but rather present a genuine controversy susceptible to a specific declaration of the legal rights of the parties. Nor is this a case that presents a "political question" not subject to adjudication by this court. In short, the court finds that all of the elements of a justiciable controversy are contained in the complaint filed in this case.

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants argue that plaintiffs have failed to state a claim upon which relief can be granted in asserting that the Constitution requires the Census Bureau to utilize statistical and demographic techniques to adjust the actual head count figures for purposes of apportioning congressional and state legislative districts and for purposes of allocating funding. They assert that the language of Article 1, § 2, clause 3 of the United States Constitution which calls for an "actual enumeration" has been and should be interpreted to preclude a statistical adjustment to the population base for purposes of apportionment of representatives. They also assert that, by negative implication, Congress has concluded that the use of statistical techniques for purposes of apportioning representatives among the states would be inappropriate to the extent it has provided in 13 U.S.C. § 195 that statistical techniques can be used for other purposes but not for purposes of determining the number of people in the United States which is to be used in turn for apportioning representatives. Finally, defendants argue that plaintiffs are simply looking to the wrong defendants for redress of their grievances. They suggest that their argument would be more appropriately addressed to Congress and to the Michigan legislature than to the Bureau of the Census.

Plaintiffs respond to defendants' first point by asserting that, according to such cases as *Wesberry* v. *Sanders, supra*, Article 1, § 2, controls congressional apportionment within the state as well as among the states and requires, by analogy, that the population count submitted to the President by the Census Bureau reflect the actual number of persons residing in the United States at a given point in time each ten years as

accurately as possible. Plaintiffs also suggest that 13 U.S.C. § 141(d) and § 141(a) provide that sampling procedures can be used (although not exclusively) and that this is directed toward implementing the constitutional requirement. Plaintiffs further argue that the undercount is unevenly distributed among racial minorities and urban areas and that it is uncontroverted that the impact has been disproportionate as it relates to Detroit. Finally, plaintiffs assert that defendants' position is incorrect insofar as they assert that the words "actual enumeration" as used in the Constitution require that only a head count be taken. Plaintiffs' position is that the "actual enumeration" requirement of the Constitution will not tolerate the concept of an undercount and that the clause is aimed at counting the "whole number of persons" in a manner which includes the best approximation that can be made as to persons who are not actually counted. They also suggest that defendants are being disingenuous to the extent that they resist the use of statistical techniques because, in fact, the Census Bureau "imputed" nearly five million people into the 1970 census.

A close reading of *Wesberry* and its progeny reveals that the purpose of having a periodic census is to ensure that the people of the various states in the United States are fairly represented and to ensure that the "numbers of inhabitants will always be the measure of representation in the House of Representatives." It further appears that the intent of the "Framers" was to implement the goal of basing representation in the House on the numbers of people in the states as opposed to giving each state an equal voice — this, of course, was the "Great Compromise" — to have one legislative body based on representativeness.

While the original concern of the "Framers" was with representation of one state vis-a-vis another, the reapportionment cases clearly extend the requirement to equal representation with the state. As the court noted in *Wesberry*,

> (i)t would defeat the principle solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.

Id. at 14.

Logically, these principles can be extended to that branch of the federal government which is responsible for collecting the figures upon which districting is based. The wrong which is attempted to be redressed in the reapportionment cases is that a state legislature is drawing lines in such a way so as to make certain individual votes weigh more heavily than others. Similarly, plaintiffs in this case complain that, as a result of the current practices of the Census Bureau, the votes of individuals in Detroit are given less weight than those of other Michigan voters.

On the other hand, the difference between adjusting congressional district lines within a state given a certain population figure and adjusting the raw population figure using statistical techniques is a difference in kind. Where congressional district lines are concerned, the Supreme Court has rejected even *de minimis* variations

between the size of districts. *Kirkpatrick* v. *Preisler, supra*, at 531. The confidence with which raw census data can be adjusted using statistical techniques and demographic information, however, is something that the court will have to hear substantial expert opinion evidence on before it can determine whether those techniques should indeed be employed.

On several occasions, the Supreme Court has recognized the problems inherent in gathering census information. In *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), the Court had these gratuitous comments to make relative to the census:

> The United States Census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down.

Id. at 746. The Court has also cautioned, in a slightly different context, that if raw data from the Census Bureau is to be adjusted by states when redistricting, they may consider population trends but those trends must be "thoroughly documented and applied throughout the state in a systematic, not an *ad hoc manner*." *Kirkpatrick, supra*, at 535. Thus, it would appear that the Supreme Court has recognized that census figures are somewhat suspect and that it would not do violence to any Supreme Court case the court has been able to locate to adjust the raw data using statistical tools so long as it could be demonstrated to the court's satisfaction that it would result in a more accurate population figure, at least for purposes of congressional districting within the State of Michigan.

With respect to defendants' argument that 13 U.S.C. § 195 precludes the use of statistical techniques to determine the number of persons in the United States for purposes of congressional apportionment, the court is unable to interpret the statutory language so expansively. Rather, the court finds that § 195 indicates that for less constitutionally significant purposes the agencies charged with the responsibility of gathering data of this kind may decide to use statistical tools to reach certain conclusions. Plaintiffs readily admit that it would be impermissible to allow congressional apportionment to be based on population figures derived *solely* by statistical techniques and the court is inclined to agree that this would be neither permissible nor prudent. That is not to say, however, that either § 195 or the Constitution itself prohibits the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count. Consequently, the court does not find that plaintiffs' complaint should be dismissed because the course of conduct they request is prohibited by federal statute.

Finally, as far as the argument that plaintiffs are addressing their argument to the wrong branch of government is concerned, the court would simply note that defendants' counsel conceded in oral argument that the states would not be free to adjust the census data for purposes of congressional districting within the state. That alone would seem to dictate that this court is an appropriate forum that plaintiffs could look to in advancing their argument. If it were possible for the state legislature to adjust census figures before engaging in congressional and state legislative redistricting, then, of course, the argument plaintiffs would have would lie before the legislature of the State of Michigan. Similarly,

to the extent that plaintiffs are concerned about federal funding programs being tied to census figures, the court would observe that plaintiffs could always advance this argument in Congress and Congress would be free at any time to change the manner in which funds were allocated to the states by tying it to an index of some sort which would more accurately reflect the population of a given region in the country. For purposes of this motion, however, the court must conclude on the basis of the representations of the parties that, at least insofar as congressional districting is concerned, the state legislature has no discretion in terms of adjusting the raw census data and, therefore, this is an appropriate forum in which to address these complaints.

For those reasons, defendants' motion to dismiss or, in the alternative, for summary judgment is denied.

/s/ RALPH B. GUY, JR.
United States District Judge

Dated: May 29, 1980

ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

United States District Court
Eastern District of Michigan
Southern Division

(Entered May 29, 1980)
No. 80-71330

Coleman A. Young, et. al., Plaintiffs, vs. Philip M. Klutznick, et. al., Defendants.

This matter having come before the court on defendants' above-entitled motion, and the court having reviewed and fully considered the briefs of the parties and having entertained oral arguments and being otherwise fully advised in the premises;

IT IS ORDERED that Defendants' Motion to Dismiss or, in the Alternative, for Summay Judgment be, and hereby is, DENIED for the reasons set forth in an Opinion issued this date.

/s/ RALPH B. GUY, JR.
United States District Judge

Dated: May 29, 1980

OPINION

United States District Court
Eastern District of Michigan
Southern Division

(Entered Sept. 25, 1980)
No. 80-71330

Coleman A. Young, et al., Plaintiffs, v. Philip M. Klutznick, et al., Defendants.

Can a headcount of the persons in the United States, made on the 1st of April, 1980, and unadjusted for an acknowledged undercount, be used for the reapportionment of the United States House of Representatives, and the distribution of Federal funds among states and sub-state units of government? That is the question in this case. The answer is clearly no.

Since 1790, with the exception of 1970 when nearly five million people were imputed and added to the headcount, the population of the United States, and its various governmental units has been determined by an unadjusted headcount, made by various means. In the past several censuses, this has resulted in an undercount of the population. This undercount has been the greatest among minorities — particularly Blacks and Hispanics — and particularly Blacks and Hispanics living in large urban areas. In 1960 and 1970, four times as many Blacks were not counted as whites, and in 1970 this occurred even after the imputation of nearly five million people. In 1980, it is predicted that the same differential undercount will occur. Additionally, it is estimated that 8 percent of the Hispanics will not be counted. This lawsuit seeks to require an adjustment of that undercount.

The plaintiffs are Coleman Young, individually and as Mayor of the City of Detroit, and the City of Detroit. The defendants are Philip M. Klutznick, Secretary of Commerce, and Vincent P. Barabba, Director of the Census. The United States Conference of Mayors has filed a brief amicus in support of the plaintiffs, and Congressman Jim Leach of Iowa has filed one in support of defendants.

It is conceded that the way in which the Bureau of the Census goes about determining the number of people who reside in the United States on a particular day in each decade results in missing a great number of people. A disproportionate number of these individuals are Blacks and minorities. In 1970, by the Census Bureau's own estimate, nearly 10.2 million persons were not personally contacted during the count. This represented 2.5 percent of the population. The Bureau estimated that 1.9 percent of the whites and 7.7 percent of the Blacks were not counted. In 1970, of this 10.2 million, 4.9 million who were not actually counted were included in the official count by "imputation" and allocated among the states for purposes of apportioning congressional seats. Still, approximately 4.3 million people were not included in the census figures.

Plaintiffs claim that, unless there is an adjustment for the undercount, individuals who live in urban areas with high Black populations and those who live in areas with high Hispanic populations will be deprived of their right of equal representation in the House of Representatives of the United States, and in the State Legislature of Michigan, and will lose substantial sums of money, in that more than 100 federally-funded programs are tied in one way or another to census figures.

The constitutional theory of plaintiffs' claim is that Article 1, Section 2, Clause 3 of the United States Constitution, providing for the taking of a decennial census, requires that the official decennial population count reflect as accurately as is reasonably possible the true population of the states, cities, and other governmental sub-units within each state. Plaintiffs claim, and it is not seriously disputed, that an official population count, using only raw, unadjusted census data, does not accurately reflect the actual population of the states, and governmental units within the states. Furthermore they claim — and this is not substantially disputed — that about four times as many Blacks as Whites are undercounted in urban areas, and an equal number of Hispanics are undercounted in the areas where they are located throughout the United States.

Defendants, on the other hand, contend that since 1790 the decennial census of the United States has consisted of a straight-forward headcount of all persons residing within the United States. They claim that the goal of the census is to be as accurate as reasonably possible, but that there is always inherently less than absolute accuracy since a relatively small number of persons are missed in the census process. They say that since the first census was taken in 1790, these persons have not been counted as part of the population base used for apportionment of members of the House of Representatives among and within the states, and that Article 1, Section 2, Clause 3 of the Constitution requires this result, since, by its terms, apportionment can be based only on persons who are actually enumerated in the census.

The case came to trial in last August, and testimony was taken for several days. Briefs were filed, and final argument was held on September 10, 1980.

At the outset, it must be noted that the decennial census is a process, or in the words of the Supreme Court, an event. *Gafney* v. *Cummings*, 412 US 735 (1973). The taking of a decennial census is authorized and directed by the express language of the Constitution in Article 1, Section 2, Clause 3, which, in pertinent part, provides:

> "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers . . . The actual enumeration shall be made within three years after the first meeting of the Congress of the United Sates, and within every subsequent term of ten years, in such manner as they shall by law direct . . ."[1]

The very concept of a decennial census arose out of the attempt of the framers of the Constitution to preserve the equality of vote for the House of Representatives. The adoption of the proposal for the taking of the census occurred on the heels of the "Great Compromise" that gave birth to the United States Constitution. As the Supreme Court pointed out in *Wesberry* v. *Sanders*, 376 US 1, 13, 14 (1964):

> "The debates at the convention made at least one fact abundantly clear: That when the delegates agreed that the House should represent 'people' they intended that in allocating congressmen the number assigned to each state should be determined solely by the number of the state's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure

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[1] See also Section 2 of the 14th Amendment.

> 'fair representation of the people, an idea endorsed by Mason as assuring that 'numbers of inhabitants should always be the measure of representation in the House or Representatives."

A long line of cases rooted in the Constitition[2] and its history has established that the right to vote is one crucial to the preservation of our democratic society, and that such right cannot be abrogated. In *Reynolds* v. *Sims*, 488 US 533, 555 (1963) the Supreme Court stated:

> "The right to vote freely for the candiate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Thus the necessity for an accurate population count among and within states is inexorably tied to fair apportionment of congressional seats. That is what this case is all about. The issue is as simple as that.

I.

A threshold issue is that of standing. In ruling upon defendant's motion to dismiss filed earlier in this case, Judge Guy of this Court determined that the plaintiff had standing. *Young* v. *Klutznick*, — F. Supp — (No. 80-71330, May 29, 1980). In that opinion, he stated, inter alia (pages 14 & 15):

> "While the original concern of the 'capital framers' was with representation of one state vis-a-vis another, the reapportionment cases clearly

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[2] See: Ex Parte Yarbrough, 110 US 651 (1883); United States v. Mosley, 238 US 383 (1914); *Gomillion* v. *Lightfoot*, 364 US 339 (1960); *Gray* v. *Sanders*, 372 US 268 (1962).

> extend the requirement to equal representation within the state. As the Court noted in *Wesberry* v. *Sanders*, 376 U.S. (1963): '[I]t would defeat the principles solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — for us to hold that, within the states, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Representatives, the Convention agreed, was to represent the people as individuals and on a basis of complete equality for each voter.'
>
> "Logically, these principles can be extended to that branch of the Federal Government which is responsible for collecting the figures upon which districting is based."

Defendants, in their post-trial brief, contend that Judge Guy suffered from the misconception that states were not free to adjust the census data, and that the states were, in fact, obligated to use that data. They rely on that portion of Judge Guy's Opinion where he states at page 17:

> "If it were possible for the State Legislature to adjust census figures before engaging in congressional and state legislative redistricting, then, of course, the argument plaintiffs would have would lie before the Legislature of the State of Michigan."

Further, on oral argument, defendants contended that 13 U.S.C. 141(c) demonstrates that Congress did not impose a mandatory duty on the Bureau of Census to develop census data for regional areas within a state, and that the Constitution does not impose such a duty.

The standing issue involves a two-part inquiry: has the plaintiff alleged an injury in fact, economic or otherwise, and is there a substantial likelihood that relief requested will redress the injury claimed? See *Duke Power Co.* v. *Carolina Environmental Study Group* 438 US 59 (1978). In *Duke Power Co.* the Court said at page 72:

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to insure that concrete adverseness sharpens the presentations of the issues upon which the Court so largely depends for illumination of difficult constitutional questions' . . . As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury' to the plaintiff . . . but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct."

Here, in essence, defendants claim that the injury complained of by plaintiffs is not fairly traceable to defendants' acts or omissions.

This Court is not persuaded by this argument. *Wesberry* v. *Sanders* (supra) applied the constitutional standard for apportionment of representation among the several states to Congressional redistricting within the states. In so doing, the Court enunciated the following standard, (pages 7 & 8):

> "We hold that, construed in its historical context, the command of Article 1, Section 2, that representatives shall be chosen 'by the people of the several states' means that, as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."

In the context of Congressional apportionment among the states, it is clear that the census serves as a vehicle through which a system of representation, based upon conjecture, is rejected, and equality of representation is, in a substantial measure, achieved. It would be anomolous to conclude that the framers of the Constitution intended only to insure equality of representation among the states, but not within the states, and intended to allow the states to independently select some other means to establish equality. The principal purpose of the census is to insure fair representation of the people.

During the Constitutional Convention, Edmund Randolph observed that the states were too interested to properly conduct the census. He said, "The census must be taken under the direction of the General Legislature. The states will be too much interested to take an impartial one for themselves." 1 Farrand, Records of the Federal Convention 580 (Yale Univ. Press 1911). Therefore, the obligation of overseeing the census was relegated to Congress as an exclusively federal function. His observation is no less true today. Just as the states have a strong interest in the number of seats in the House, so, too, the states have a strong interest in the relative strength of the vote between different and often times competing geographic areas within the states.

Moreover, the Supreme Court has implied that, in the first instance, the states must rely on census data for the purpose of Congressional redistricting. In *Kirkpatrick* v. *Preisler* 394 US 526 (1968) the State of Missouri argued that its apportionment plan must be based upon considerations of population shifts subsequent to the 1960 census. The redistricting was done in 1967, and the

census had been taken in 1960. The Supreme Court rejected this argument. It said: (page 535):

> "We recognize that a Congressional districting plan will usually be in effect for at least 10 years . . . Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them."

The Court held that, since it could not be demonstrated that population trends in Missouri had been thoroughly documented and applied throughout the state in a systematic manner, Missouri was required to redistrict in 1967 solely on the basis of the 1960 census figures.

It follows that Missouri will be required to redistrict in 1982 on the basis of the 1980 census figures. So will Michigan and every other state in the Union. Article 1, Section 2, Clause 3 of the Constitution so commands, so that there be a proper and federally certified base for redistricting in accordance with strict mathematical equality. It is clear that the framers of the Constitution could not have intended that the census provide the standard for apportionment among the states while simultaneously intending that a different and possibly conflicting assessment of state population govern apportionment within the state.

In *Prigg* v. *The Commonwealth of Pennsylvania* 41 US 539, 618, 619 (1842), the Supreme Court observed that, although the power to apportion representatives amongst the several states is not expressly granted to the Congress, such power logically flows to Congress as a result of its express authorization to provide for an

enumeration of population every ten years. Here too, the requirement that the states employ the official population count, as established by the decennial census has "always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution."

In *Dixon* v. *Hassler* 412 F Supp 1036 (W.D. Tenn. 1976) a three-judge District Court held that whether or not Census Bureau estimates effective as of July 1, 1974, could be considered in a Congressional apportionment case, the proof in the case did not show that such estimates were the best evidence of the relevant population, and, therefore, the 1970 decennial census figures must be followed.

It is therefore clear that the Constitution commands that the data taken from the decennial census govern apportionment within the states. Just as apportionment among the states cannot be carried out without federally certified numbers, the redistricting of congressional districts must necessarily take place on the basis of census data. Such redistricting requires federally certified numbers.

All of the 50 states are required to use census data for the purpose of congressional redistricting.

Plaintiffs have alleged injury in fact, both economic and political, if there is no adjustment of the census figures, and clearly there is a substantial likelihood that the relief requested will redress the the injury claimed. Thus, plaintiffs have standing to maintain this action.

II.

Defendants again contend, as they did before Judge Guy, that if the Constitution permits a statistical adjustment for apportionment of representatives, then Congress has express constitutional authority to decide whether to require such an adjustment, such decision being an unreviewable political question that this Court cannot resolve. Judge Guy pointed out in his opinion on defendants' motion to dismiss (*Young* v. *Klutznick* (supra) (page 17):

> ". . . Defendants' counsel conceded in oral argument that the states would not be free to adjust the census data for purposes of congressional districting within the state. That alone would seem to dictate that this court is an appropriate forum that plaintiffs could look to in advancing their argument. If it were possible for the State Legislature to adjust census figures before engaging in Congressional and State Legislature redistricting, then of course the argument plaintiffs would have would lie before the Legislature of the State of Michigan . . . For the purpose of this motion, however, the court must conclude on the basis of the representations of the parties, that, at least insofar as Congressional districting is concerned, the State Legislature has no discretion in terms of adjusting raw census data, and, therefore, this is an appropriate forum in which to address these complaints."

Nothing that has been subsequently heard by this court, either in testimony, briefing, or oral argument, requires a different conclusion.

Defendants argue that the concept of non-justiciability of political questions is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint. They claim that the term "political question" refers to an issue which, according to the Constitution, must be resolved by means the Constitution has specifically committed to a political department rather than the judiciary. They then argue that Article 1, Section 2, Clause 3 of the Constitution mandates, rather than empowers, Congress to make enumerations, and explicitly requires that Congress determine the manner in which such enumerations are to be made. They claim the Constitution contains a "textually demonstrable commitment" of all census matters to the Congress of the United States, and not to the courts.

Strangely enough, defendants rely upon *Baker* v. *Carr* 369 U.S. 186 (1962) in support of their conclusion. They seem to forget that *Baker* v. *Carr* specifically overruled *Colegrove* v. *Green* 328 US 549 (1946), which held that reapportionment was a political question and not subject to adjudication by the courts. Nonetheless, defendants cite a discussion of six factors in *Baker* v. *Carr* which that Court said were characteristic of a political question. The Court said, on page 217:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent

> resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

They claim that any one of these facts, if extricable from the case at bar, is sufficient to make the question nonjusticiable. They further say that the application of these factors to this case compels such a conclusion.

It is clear that Article 1, Section 2, Clause 3 is not a "textually demonstrable constitutional commitment" to the Congress of the question of whether the Constitution requires that the official population count be adjusted for a Black and Hispanic undercount. All that Article says is that there shall be an actual enumeration every subsequent 10 years in such manner as Congress, by law, shall direct. All it does is impose on Congress the responsibility to provide for the taking of a decennial census. It does not say that Congress and Congress alone has the responsibility to decide the meaning of, and implement, Article 1, Section 2, Clause 3. It does not speak to the guarantee of equal representation for equal numbers of people, which is the crux of this case.

The same argument was made in *Wesberry* with respect to Article 1, Paragraph 4. It was argued that Article 1, Paragraph 4 had given Congress exclusive authority to protect the rights of citizens to vote for Congressmen, just as it is here argued that Article 1, § 2, Clause 3 give Congress the exclusive authority to decide whether an adjustment should be made for the Black and Hispanic undercount differential. The Court rejected this

contention with words that are equally applicable here (page 6 & 7):

> "We made it clear in *Baker* that nothing in the language of that article gives support to a construction that would immunize state Congressional apportionment laws, which debase a citizen's right to vote, from the power of the courts to protect the Constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marberry* v. *Madison* . . . The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article 1."

It should be noted that the Court very carefully referred to Article 1 as a whole, not merely to Article 1, Clause 4. In *Powell* v. *McCormick* 395 US 486 (1969), the court held that Article 1, Paragraph 5, which provides that each House shall be the judge of the election returns and qualifications of its own members, did not constitute a textually demonstrable constitutional commitment to the Congress of the question of whether Congress could refuse to seat a member who possessed the qualifications of age, citizenship and residence set forth in the Constitution. If Article 1, Paragraph 4, and Article 1, Paragraph 5 do not constitute textually demonstrable constitutional commitments of those questions to the Congress, then surely Article 1, Section 2, Clause 3 does not constitute a textually demonstrable constitutional commitment to the Congress of the question of whether the Constitution requires an adjustment be made in the official population count for the Black and Hispanic undercount differential. That question is not for the Congress, but for the judiciary,

whose constitutional function it has been ever since *Marberry* v. *Madison* to "say what the law is." This court has authority to decide the issue before the court.

III.

The decennial census is a constitutionally mandated attempt to enumerate the whole number of people in the United States. It is an undertaking of vast proportions. Vincent Barabba, Director of the Census, testified that in the most recent census 275,000 people were hired, and more than 80,000,000 questionnaires were mailed out, and 410 district offices were maintained throughout the country.

To facilitate the taking of the census, the United States is divided into a number of regions, which, in turn, are divided into enumeration districts. Each of the 410 district offices had approximately 750 enumeration districts, and cities are divided into census tracts, which are areas small enough to enable the Bureau of Census to monitor change within the cities.

It was conceded at trial that every census has necessarily involved an undercount. The phenomenon irresistibly flows from the magnitude and the manner of the undertaking. Defendant Barabba stated, at page 3 of his affidavit of May 6, 1980,

> "Despite the elaborate procedures designed to insure that all persons are counted, it is generally recognized that it is impossible to count every one. Entire housing units may be missed by the Census Bureau. The number of persons living in enumerated housing units may not be reported completely by the householder. Both situations lead

to an undercount of the population. Given the magnitude of the undertaking, and the nature and causes of the undercount, the Census Bureau is unable to determine the location of all missed living quarters, or the identity of all householders who report incomplete information . . ."

"Following the 1950, 1960 and 1970 censuses, estimates of undercount were prepared and announced publicly by the Bureau. According to our most recent calculations, the estimates of the per cent of the population undercounted in 1950, 1960 and 1970 are 3.3, 2.7 and 2.5 respectively."

Most significant for the purposes of this lawsuit is the fact that it is equally well accepted that there is a differential undercount. Otherwise stated, it is agreed by all that the undercount impacts upon Blacks and whites in a differential manner, resulting in a more severe underenumeration of Black people. Exhibit 4, a Bureau of Census publication entitled "Estimates of Coverage of Population by Sex, Race, and Age: Demographic Analysis," February 1974, states at page 7:

"The estimates of the coverage of the population in the 1970 census that have been derived indicate that about two-thirds of the persons missed in that census were males, and about two-thirds were white. According to the preferred set of estimates, . . . the net omission rate for males in 1970 (3.3 per cent) was nearly twice that for females (1.8 per cent), and the net omission rate for Negroes (7.7 per cent) was about four times as great as for the white population (1.9 per cent)."

If anything became clear from the testimony at trial, it was that Black people are repeatedly differentially

undercounted at a rate approaching 4 to 1. In other words, four times as many Blacks are undercounted as are whites. And the testimony also established that almost as large a percentage of Hispanics have been undercounted.

Extensive expert testimony as to the underlying causes of the differential undercount was taken. Although the precise weight to be attributed to the various factors involved is not known, all of the experts agreed that some or all of the cluster characteristics associated with race are major factors. In this regard, Dr. Philip M. Hauser, a witness for the plaintiffs, stated that the following characteristics should be considered important:

1. lower income leading to diverse and unique housing patterns and living arrangements which frequently involve the lawful or unlawful conversion of housing units to accommodate increased numbers of people;

2. greater antagonism or resistance to government;

3. relatively less education; and

4. increased numbers of individuals within the harder-to-enumerate categories, such as young males.

Thus, the decennial census undercount results in dilution of plaintiff's vote relative to the votes of whites within the State of Michigan. The undercount gives rise to a constitutional violation of the one-person one-vote principle because Blacks simply are not counted as much as whites, and this is particularly true in the inner cities of this country. See exhibits 14 and 15, and the uncontroverted testimony of plaintiffs' witness, Dr. Carl E. Taeuber, which established that Blacks are

overwhelmingly concentrated in the urban areas of the United States.

Dr. Taeuber, a sociologist at the University of Wisconsin, has developed a segregation index which numerically reflects the degree of segregation by race within various geographical areas. On a scale of 0 to 100, 100 reflects complete segregation. Dr. Taeuber indicated that in 1940, 1950, 1960 and 1970 every major United States city, including Detroit, reflected a high segregation index. He further stated that, in his opinion, the pattern would not change in 1980. He testified, and the Court accepts his testimony, that, of 22.6 million Black people in the country, 16.8 million are concentrated in 34 metropolitan areas, each of which had more than 100,000 Black people. The segregation index for Blacks in Detroit in 1970 was 91, and the same pattern was replicated in smaller cities in Michigan, the segregation indices for Flint, Grand Rapids, Lansing and Saginaw being 87, 90, 93 and 88, respectively.

Defendants did not controvert any of the foregoing facts because, in large measure, Dr. Taeuber's research was based on data from the Census Bureau. These and other data establish as a matter of fact that the differential undercount results in a distortion of constitutional magnitude diluting plaintiff's voice in relationship to white voters in the non-urban areas of the State of Michigan. Such distortion clearly violates the principle of one-person one-vote.

It was also established that Hispanics, as a whole, reside in segregated urban areas or in non-urban areas in the southwest in segregated groups, and possess cluster characteristics similar, if not identical, to the cluster

characteristics of Black people. A differential undercount exists as between the general white population and Hispanics, and that undercount is compounded by the number of undocumented Hispanics living in the United States.

All of the experts agree that in deriving an estimate of the undercount for Hispanics, novel problems are presented arising from the fact that accurate birth, death, immigration and emigration statistics are not available. Thus a demographic analysis, comparable to the demographic analysis for white people and Black people, which can adjust the actual count (see infra) cannot be completed for Hispanics.

With reference to defendants' claim that the decennial census has only been a simple headcount, and that is what the Constitution mandates, plaintiffs' expert, Dr. Philip Hauser, a former director of the Census, testified that the decennial census was nothing more than an estimate of the population. He defined the census as an estimate derived from a headcount and numerous other devices which could involve a series of judgments for error. All of the plaintiffs' experts pointed to the 1970 decennial census as a graphic illustration of devices employed by the Bureau of Census to impute population which had not been enumerated in the actual headcount and whose utilization in 1970 rebuts the notion that the census is only a simple headcount.

Exhibit 8, "Effect of Special Procedures to Improve Coverage in the 1970 Census", Bureau of Census, 1974, is a census publication describing the various methods employed by the Bureau to adjust the official count in 1970. In speaking of the imputation program which

added 4.9 million people to the census, Exhibit 8 states as follows:

> "The second type included a group of projects intended to locate households or individuals that were missed in the initial field activities and add them to the census counts. In some of the most important of these projects, sampling was used, and, as a result, only estimates of missed persons and housing units could be added to the counts . . ."

As to other methods of imputation and adding persons to the actual headcount, namely the nation vacancy check, the post-enumeration Post Office check, and the supplemental forms operations, the Bureau stated in Exhibit 8, page 2,

> "The remaining three-fourths of the added persons, and one-half of the added housing units came from the second category of projects, which consists of operation in which the post-census investigations were used to detect deficiencies in census coverage. The population and housing counts for each small area of the United States were adjusted to reflect the results of these checks. The characteristics of persons and housing units added in this manner were those of persons and housing units previously enumerated."

Thus the Bureau of the Census admits that the foregoing operations added people to the 1970 census, and that these people were added by imputation when the Bureau did not have hard evidence, such as a census questionnaire, that they even existed in the quantity imputed.

The procedures adopted by the Bureau in 1970 prove that when the Bureau deemed it necessary to adjust census figures to preserve their statistical integrity, it has added people. In 1970 10.2 million people were missed, and the Bureau imputed approximately 4.9 million back into the count, leaving 5.3 million as the undercount.

It is therefore clear that the defendants' contention that the Constitution mandates that the decennial census be nothing but a simple, staightforward headcount rings hollow. Their contention that the adjustments in 1970 were somehow different, because the Bureau had some indication as to where to place the imputed persons, simply is not persuasive. In fact, such an assertion is astonishing in light of the "sampling" techniques utilized to impute persons and housing units that the Bureau estimated existed.

One of the chief issues of trial was the reliability of a method of distributing the undercount rate from the national level down to the state and sub-state levels known as the synthetic method. The simple synthetic method is an arithmetical procedure which can be used to distribute the total undercount of the United States by age, race or sex to local areas. It is a procedure employed to apportion undercount figures among the states and sub-state areas. New population figures derived by the use of the synthetic method are referred to as the adjusted population count.

In its simplest application, the national rate of undercount for any one of the variables (age, sex or race) is used to expand the unadjusted census figures for each of the local areas for which census data exists. For example, in any area with more than a de minimus number of Blacks, the national rate of undercount of Blacks, multiplied by the unadjusted census figures,

would yield the net adjustment for Black people in that locality. Said adjustment would in turn be added to the census figure to derive the adjusted census count for that locality. Computations can be carried on for subgroupings within each of the variables (age, race or sex).

The reliability of this method was seriously challenged by Jacob Siegel of the Census Bureau, but Dr. Barbara Bailar, Associate Director of the Census, conceded that the synthetic method, or a variation thereof, was utilized as a part of the 1970 census in the imputation operations previously discussed. Most particularly this method was employed in the vacancy operation and in the computer method used to impute persons and characteristics, and even housing units. Both plaintiffs' and defendants' experts characterized this computer method as the "hot deck" method.

It is therefore clear that the decennial census is not, and has not been, for at least the past decade, a simple, straightforward headcount. Rather, the decennial census is a relatively accurate estimate of the population developed through the use of self-enumeration by questionnaire, statistical techniques, and computer-control devices.

Plaintiffs contend that procedures already known to and well understood by the Bureau, and already employed by the Bureau in one form or another, can be used to adjust for the differential undercount. Their experts testified that through the use of the demographic method, an estimate for the national undercount by age, race and sex could be easily generated. This contention remained uncontroverted at trial. All the experts, both plaintiff and defendant, conceded that the estimate of the national population derived through the use of the demographic method is more accurate than the actual

census count. The demographic method, according to the affidavit of defendant Barabba, is a comparison of the expected number of persons estimated independently with the actual number enumerated. The expected number can be described as the number born since a particular year, minus the number of such persons who have died, and adjusted for the number who have moved into or out of the country. A modification of this technique was used in the 1950, 1960 and 1970 censuses to provide national undercount estimates of the total population for race, age and sex.

At trial, defendant Barabba testified that as of April 1, 1980, the total number of people in the country, including the undercount, was 227,224,000 and the actual census count will show approximately 222,000,000. It was the demographic method which allowed him to arrive at these figures.

It is significant that only a few months before trial, defendant Barabba stated in his affidavit as follows:

> "All the procedural and promotional efforts, including those given as examples in paragraph 7, are expected to yield rates of coverage completeness, particularly for certain population segments, which are better than previous censuses. Nevertheless, I am unable to predict today how successful we will be; nor can I predict what the undercount rates will be for the Nation, for the various geographic areas, and for the various population subgroups. This will not be known by anyone until the census results are tabulated and then compared with expected estimates. For this reason the Census Bureau is continuing to study the undercount problem and the issue of adjustment."

The inconsistency between the affidavit and Mr. Barabba's testimony leads the Court to believe that the Census Bureau presently has a good idea of the undercount for the 1980 census. Whether this was obtained through sampling or some other method is not known. Nevertheless, it is abundantly clear that the development of an estimate of the national rate of undercount is not dependent upon the tabulation of all the actual census results, nor is an estimation by age, race and sex. The demographic method can be employed for statistically defensible estimates of the national undercount for Blacks and whites by age and sex. However, it cannot be used to develop estimates for Hispanics.

It is acknowledged that the demographic method cannot be used to develop undercount estimates below the national level. This is primarily attributable to the fact that migration between states is very heavy, and there are no records comparable to national immigration and emigration records.

Thus the heart of the controversy as to method of adjustments pertains to how or whether the national rate of undercount can be apportioned to the state and sub-state areas in a fashion that results in adjusted census figures which are closer to the truth than the unadjusted census count. To obtain distribution of the national undercount to state and sub-state areas, plaintiffs contend that two methods are available to defendants. The first is the distribution of the national undercount through the use of the "simple synthetic" method in a manner which will result in adjusted census figures which are, it claims, closer to the truth than the raw, unadjusted census data. All of plaintiffs' experts so testified.

The reliability of the synthetic method in arriving at the undercount in urban areas is attributed to the fact that Blacks reside overwhelmingly in the urban areas of the United States, that they are homogeneous populations, and in the main are subject to similar income, similar education and similar segregated housing.

The validity of the synthetic method for obtaining counts in urban areas is premised upon homgeneity of population. It is not necessarily true that the simple synthetic method would be accurate in suburban areas, or in areas where the Black population is very small.

It is conceded by plaintiffs that the simple synthetic method necessarily involves the assumption that factors attributing to the national rate of undercount are, relatively speaking, uniformly duplicated in each local area for which it is used to make an adjustment. As pointed out above, such assumption cannot be valid universally. But plaintiffs contend that the assumption is sufficiently valid in urban areas in dealing with the undercount of the vast majority of Black persons, because of their inordinate urban concentration and similar cluster characteristics. Robert B. Hill, the Director of Research for the National Urban League, an expert for the plaintiffs, testified as to the urban concentration of Black and Hispanic people, and stated that the simple synthetic method would be particularly appropriate in large urban areas because of the homogeniety of the population.

The second method is the current population survey match, which is a system of comparing the lists of persons in one or more survey or sets of records with the list of persons in the census to determine who was missed in the census. The method involves matching on

a person-to-person basis. In theory, the method can be used to distribute among the states and other large areas the national undercount estimate derived by demographic analysis. This method can also be used to determine the Hispanic undercount.

Finally, all of the experts agreed that some areas might not merit an adjustment at all. Such areas are those particularly easy to enumerate because of stable living patterns and generally higher education. The suburbs are small enough and possess limited numbers of Black persons so that the total population is generally counted.

Defendants conceded at trial that, assuming the current population survey match and appropriate corrections were carried out, the Bureau would be capable of distributing the national undercount for Blacks to state and sub-state areas. In addition, they conceded that such a match would enable them to develop, in a statistically defensible manner, an estimate of the national undercount for Hispanics, and distribute that estimate among the states and sub-state areas.

It is therefore clear that there are proper and adequate methods of adjustment of the raw census data that can be used by the Census Bureau to give reasonably accurate and statistically defensible counts that are more accurate than the raw enumeration of the Census Bureau.

The Court having determined that there are proper and adequate methods for adjusting the raw census data to give a reasonably accurate and statistically defensible adjusted count at the national, state and sub-state levels, the question remains whether such an adjustment is mandated.

IV.

Plaintiffs' case is bottomed on the dual constitutional argument that Article 1, Section 2, Clause 3 of the Constitution requires the Bureau of Census to make an adjustment for the number of Black and Hispanic people that will not be included in the decennial census, and that this Article imposes an affirmative duty upon the Secretary of Commerce and the Bureau of the Census to arrive at an enumeration of the whole number of persons within the United States, which is as close to the truth as is practicable. The claim that a failure to adjust the data from the raw population enumeration of the decennial census for a known underenumeration of Black and Hispanic people violates Article 1, Section 2, Clause 3, and the 14th Amendment, which guarantee that all people will have their vote counted equally with all other persons.

Plaintiffs, in their post-trial brief, cogently stated the issues before the Court. Does the Constitution require that an adjustment be made in the official population count of the decennial census for the anticipated differential undercount of Black and Hispanics? If the Constitution does require that such an adjustment be made, how is the Constitutional obligation to be implemented with respect to the 1980 decennial census?

We have seen that in both the 1970 and the 1960 censuses, Blacks were undercounted at a rate four times that of whites. We have also seen that the racial undercount differential for the 1980 census is likely to be at least as large as in past censuses.

The Census Bureau testified that if its coverage improvement methods were uniformly successful, the overall undercount rate could be reduced from its 1970

level of 2.5 per cent to 1.4 per cent, but that the 4 to 1 ratio differential of completeness would remain. The Bureau further stated that in the unlikely event that only coverage improvement methods directed at Blacks were successful, the overall undercount rate will be reduced to 2.3 per cent, and the differential of completeness would be reduced to 2.7 to 1. It further estimated that the Hispanic undercount rate in the 1970 census was intermediate between Black and white, closer to Black, and that in 1980 it will be closer to the Black undercount than to the white.

Defendants contend that Article 1, Section 2, Clause 3 of the Constitution prohibits statistical adjustment of the decennial census count for the purpose of apportionment of representatives among the states.

They claim that interpretation of the phrase "actual enumeration" in Article 1, Section 2, Clause 3 must begin with the words themselves, and that the terms "census" and "enumeration" mean nothing more or less than a headcount. They say that the use of the modifier "actual" with the word "enumeration" can only reinforce the conclusion that the framers of the Constitution intended a headcount, and nothing but a headcount. They further rely upon the fact that, with the exception of the 1970 census when imputations were performed which added approximately 4.9 million people, the census has been, since 1790, an actual headcount and nothing more.

The Court finds nothing in the Constitution that prohibits adjustment techniques. When the Constitution speaks of actual enumeration, it speaks of that as opposed to estimates. The framers wanted, as much as possible, an accurate count because the count was to be used for the determination of Congressional appor-

tionment. It is clear from *Wesberry* (supra) that the Supreme Court interpreted Article 1 to require a reapportionment among the states, and within the states, based upon actual population count. The face of Article 1, Section 2, Clause 3 makes no mention of a headcount.

It seems clear that the framers were most concerned that representation be achieved in the House on the basis of numbers, and to that end delegated to Congress the task of determining the method by which an "actual enumeration" would take place. In fact, the delegation of the responsibility as to the method of enumeration negates defendants' contention that a headcount is the sole procedure authorized by the Constitution. If the defendants' claims were valid, there would simply be no need for language as to the manner of taking the census.

In *Federation of American Immigration Reform* v. *Klutznick*, 486 F. Supp. 564 (D DC) (1980), The Court found that the Constitution required the counting of whole numbers of persons, although it did recognize that for apportionment purposes the straightforward headcount had been used since the first census in 1790. The Court, on page 576, quoted Representative Celler of New York, who said:

> "The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. We count the convicts who are just as dangerous and just as bad as the Communists or the Nazis . . . The only way we can exclude them would be to pass a Constitutional Amendment."

As pointed out in the brief Amicus of the U.S. Conference of Mayors, one certainly has to question why the Census Bureau is required to count convicts and

Communists and Nazis, but is not required to count, or account for, 2.5 to 3 per cent of the population. The fact is that the Census Bureau is required to count them. Article 1, Section 2, Clause 3 requires it. The 14th Amendment requires it, because census figures must be used for apportionment of representatives among the states and within the states. See *Wesberry* and *Kirkpatrick* v. *Preisler* (supra).

The Courts that have considered this matter are unanimous in holding that the method, as opposed to the fact, of enumeration under the census is a procedural matter, and as such is within the discretion of the Bureau, subject to the Constitution and the disapproval of Congress, the Secretary of Commerce, or the Courts themselves. See *Lampkin* v. *Conner*, 360 F.2d 505 (D DC) (1966); *Newark* v. *Blumenthal*, 457 F. Supp. 30 (D DC) (1978).

It is unthinkable to suggest, that, when the allocation of federal resources and the apportionment of Congressional Representatives rest upon an accurate census count, and when the Census Bureau itself knows that there is an undercount, which heavily disfavors Blacks and minorities, and when a method can be found to correct that undercount, that the words "actual enumeration" in the Constitution prevent an adjustment to obtain a more accurate figure than the actual headcount. Even the Census Bureau itself does not believe this, for in 1970 it imputed several million people to the actual headcount of that year.

The words "actual enumeration" in Article 1, Section 2, Clause 3 do not prohibit an accurate statistical adjustment of the decennial census to obtain a more accurate count. Quite to the contrary, Article 1 of the Constitution, which mandates equal apportionment of

representatives, mandates an adjustment to obtain a figure that more accurately reflects the actual population of the United States and state and sub-state areas than the unadjusted headcount. So does the 14th Amendment.

Moreover, as witness Bailar pointed out at trial, the Census Bureau does not conduct a "headcount" which they claim they are required to do by the Constitution, but rather a "household count." The widespread use of imputations in 1970, many of which will continue in 1980, were based, in fact, on tangible evidence of the existence of a housing unit, and, in many instances, the persons occupying it.

Further, in the 1970 census, the Census Bureau imputed persons even where it could not find a particular housing unit in which to put them. Where the individual census reports and the "were you counted" forms could not be geographically identified to an enumeration district, let alone to a particular house within an enumeration district, the Census Bureau located these "created households" in a large enumeration district and put them "into space" within that district.

Plaintiffs do not contend that all of the imputations done in 1970 and planned for 1980 are unreasonable. They point out that the Census Bureau's unbroken historical practice really has been to use modern knowledge and scientific techniques to get further and further away from simple headcounting. Instead of headcounting people, it uses the mailout form and the mail-out/mail-back format to enumerate most persons today. It created 4.9 million persons by imputation in 1970, and will create many persons by imputation in 1980. Except for the crucial Black and Hispanic

undercount differential, it uses modern knowledge and scientific techniques to create persons so as to make the official population count more complete and more accurate. Plaintiffs agree this is exactly what the Census Bureau should do.

The decennial census is not a "house count" or a "headcount," or a "headcount plus a house count." It is an estimation by the best means currently available of the population of the United States, and of the states and sub-state areas of the country. The term "actual enumeration" means an official population count, and in order to implement the "equal representation for equal numbers of people" principle of the Constitution, that official population count must be as complete and accurate a count as it is reasonably possible to make.

With the modern knowledge and the scientific techniques available to adjust for the known undercount differentials, and to bring about official population counts that are closer to the truth than those derived from the raw, unadjusted headcount, surely the framers of the Constitution would have intended that such an adjustment be made.

Defendants further contend that even if the Constitution does not prohibit an adjustment for apportionment of Representatives, Congress has by statute prohibited such an adjustment. For their authority, they cite 13 U.S.C. § 195, which provides:

> "Except for the determination of population for purposes of apportionment of representatives in Congress among the several states, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

In 1976, the Congress, by Public Law 94-521, amended Title 13 U.S.C. 195 as quoted above. Prior to the amendment, § 195 read:

> "Except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this Title."

Defendants argue that Congress was aware of the long-standing view of the Census Bureau that an adjustment for apportionment of representatives was prohibited by the Census Act, and the Congress' 1976 Amendment of § 195, without changing the prohibitory language concerning apportionment of representatives, was a ratification of that interpretation. This is not the fact.

In 1976, when Congress amended the statute, it must be assumed that it was well aware that, in the 1970 census, several devices to impute people that had not been counted were used by the Census Bureau. The amendment to § 195 does nothing more than tighten the language of the prior statute and substitute the word "shall" for the word "may." It also more clearly refers to congressional apportionment rather than simply referring to apportionment. In net effect, the amendment serves to strengthen the Census Bureau's power to use sampling techniques where congressional apportionment is not involved.

Judge Guy, in his opinion, *Young* v. *Klutznick* (supra), dealt with this issue. He said:

> "With respect to defendant's argument that 13 U.S.C. 195 precludes the use of statistical techniques to determine the number of persons in the United States for the purposes of congressional appor-

> tionment, the Court is unable to interpret the statutory language so expansively. Rather, the Court finds that § 195 indicates that for less constitutionally significant purposes, the agencies charged with the responsibility of gathering data of this kind may decide to use statistical tools to reach certain conclusions. Plaintiffs readily admit that it would be impermissible to allow congressional apportionment to be based on population figures derived *solely* by statistical techniques, and the Court is inclined to agree that this would be neither permissible nor prudent. That is not to say, however, that either § 195 or the Constitution itself prohibits the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count. Consequently, the Court does not find that plaintiffs' complaint should be dismissed because the course of conduct they request is prohibited by federal statute."

In *United States* v. *Jackson*, 280 U.S. 183, 196, 197 (1930), the Court said:

> "If there were any doubts on the question, the silence of Congress in the face of the long-continued practice of the Department of the Interior in construing statutes (in a particular manner) . . . must be considered 'equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress.' "

This Court agrees with Judge Guy's reading of § 195. There is nothing contained in 13 U.S.C., § 195, as amended, which would suggest that the Congress was interested in terminating the Census Bureau's practice, mainifested in the 1970 census, of adjusting the census returns to account for people who were not enumerated.

All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count.

This interpretation is consistent with a finding that the statute is constitutional. A court should avoid construction of a statute that would render it ineffective and unconstitutional. Were the Court to read the statute as contended by defendants, it would have to find the statute unconstitutional, because the Constitution mandates the most accurate count that can be obtained, and this necessarily includes more than an adjusted headcount.

Defendants next contend that, even if the Constitution and the Census Act permit an adjustment for apportionment of representatives, the Census Bureau's decision whether to perform such an adjustment is committed to agency discretion, and is not subject to judicial review.

They argue that Section 10 of the Administrative Procedures Act, 5 U.S.C. 701, withholds from judicial scrutiny those cases where statutes preclude judicial review, or the action is committed to agency discretion by law. They state that where it appears from the terms of the statute, and from its legislative history, that Congress intended the ultimate decision-making authority, in a particular area, to be within the administrative agency rather than the courts, judicial review is foreclosed.

Relying upon *Panama Canal Company* v. *Grace Line*, 356 U.S. 309 (1958), the defendants state that the Census Bureau's decision whether or not to adjust the official

population counts requires the balancing of highly technical factors, which is necessarily accomplished by informed calls of judgment. These "calls of judgment" and the exercise of discretion by the Census Bureau, defendants contend, have been committed to agency discretion and are not subject to judicial review. They argue that the types of decisions to be made by the Director, in exercising his broad discretionary authority, involve specialized managerial and scientific knowledge of a kind at which a specialized agency, and not a United States District Court, is most expert.

In short, defendants argue that the Census Bureau is supreme in determining the method of counting, and that even though constitutional questions are involved, as they clearly are here, this Court may not interfere with the decisions of the Census Bureau because of the specialized managerial and scientific knowledge of the Bureau.

The Court totally disagrees. The contentions of defendants would completely change the law. A court is not precluded from reviewing the actions of an administrative agency just because the administrative agency acts in a technical field. This is especially true when Constitutional issues of the dimensions involved in this case are at stake. To say that a United States District Court cannot look into a matter such as is before this court, where the one-person one-vote concept and the distribution of billions of dollars of federal funds are at issue, is to say that a United States District Court cannot take action to vindicate rights where major Constitutional and statutory rights are involved, merely because the determination of such rights is highly technical. This is not the law. Nothing in the law insulates the Census Bureau from proper judicial scrutiny. To hold

otherwise would be to unconstitutionally limit the powers and make administrative agencies supreme over the Federal Judiciary. This is not only bad public policy, it is bad law.

Defendants next argue that, assuming judicial review of the agency action is warranted, a review of the Census Bureau's actions indicates that their decision not to adjust the population count is lawful and proper in all respects, and that, therefore, judgment for defendants is required. Defendants state that if the Director of the Census Bureau's action here are subject to judicial review, the standard of review is extremely narrow. Defendants contend that in reviewing the Agency action in this case, the only relevant determination is whether the decision of the Director of the Census Bureau not to adjust population counts submitted to the President on January 1, 1981 to reflect an estimate of the undercount constitutes arbitrary and capricious action, and abuse of discretion, or is otherwise contrary to law.

The Court agrees that is must accord great deference to the actions of the Secretary of Commerce and the Director of the Census Bureau. But this does not mean that, when statutory and Constitutional rights of the magnitude involved here are present, the Court is tied to the narrow type of review appropriate for the decisions of an administrative agency.

In the first place, this case is not a review on the record of an administrative tribunal's decision. It is true that when a court is reviewing the decisions of an administrative tribunal on the record, clear and convincing error must be shown to reverse the decision, and the findings of fact of the administrative agency are not to be overturned unless clearly erroneous. But defendants misconceive the issue. The law relating to

reviews of an administrative tribunal simply have no applicability here. This is an original action brought in a United States District Court for declaratory relief and for injunction, raising significant statutory and Constitutional issues. As such, the issues raised must be judged and decided based upon the record made and the law presented to the Court. Thus, the law cited by the defendants relating to review of an administrative tribunal has no application to this case.

Clearly, the Constitution and laws of the United States require that the plaintiffs recieve the relief which they seek. The 1980 census figures must be adjusted to reflect the undercount, and to abolish the differential undercount between Blacks and whites, and between Hispanics and whites.

V.

Defendants next contend that even if the Court orders an adjustment of the census to reflect the undercount, there is no possible way that it can be done accurately within the time limits provided by statute, which require a report to the President of the total national census on or before January 1, 1981, and a report to the states and some 39,000 sub-state areas on or before April 1, 1981. 13 U.S.C., § 141(b), 141(c).

Since 1929 the Bureau of the Census has been obligated to deliver its tabulation of total population by states within eight months after the census date. For the 1980 census, the time limits were enlarged from eight months to nine months (13 U.S.C. 141(b)). The granting of the additional month to report to the President reflected congressional judgment that an increased time period would better enable the Bureau of the Census to meet its constitutional mandate and in all likelihood was connected to difficulties the Bureau experienced in 1970. The Senate report accompanying Senate Bill 3688, the

predecessor of the Public Law amending 13 U.S.C. 141(b) in 1976, stated:

> ". . . Subsection (b) of Section 141 provides nine months instead of the currently authorized eight months to complete the required tabulaton of the population by states for the reapportionment of the United States House of Representatives. It is for the purpose of apportioning representatives that the United States Constitution establishes a decennial census of population. The additional month provided the Bureau of the Census is intended to better enable it to meet this constitutional requirement." 1976 U.S. Code CONG. and AADM. News, page 5467.

It should be noted that Titles 2 and 13 of the U.S. Code, which form the backbone of the current legislative scheme, have a common root. The census legislation of 1929, which contained the essence of the provisions now found in Titles 2 and 13, not only required the completion of the tabulation in eight months, but also required that on the first day, or within one week thereafter, of the second regular session of the 71st session of the Congress, the President should transmit to the Congress the statement showing the whole number of persons in each state, and the number of representatives to which each state would be entitled under the apportionment of the then existing number of representatives. It is therefore clear that the nine month time period in 13 U.S.C. 141(b), and the 12 month time period in 13 U.S.C. 141(c) have significance only because they reflect the judgment of the Congress as to how the task of reapportionment can be administratively handled.

The question remains whether these time limits are mandatory upon the Bureau of the Census and the Secretary of Commerce if they cannot be met without sacrificing a count more accurate than the unadjusted head count of persons in the United States. Are time limits established by Congress mandatory or discretionary?

In *Diamond Match Company,* 181 F Supp 952, (U.S. Customs Court, 1960), the customs collector failed to mail the plaintiff's notice within the prescribed statutory time limit. The Court stated: (page 958)

> "As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time of performance in concerned, especially where the statute fixes the time simply for convenience or orderly procedure . . . Statutes fixing time for the performance of acts will ordinarily be held directory where there are no negative works restraining the doing of the act after the time specified, and no penalty is imposed for delay."

In *Ralpho* v. *Bell,* 569 F2d 607, 627 D.C. Cir (1977), the Court said:

> "In determining the effect of the windup provision, we must cleave as nearly as we can to the congressional design. That design, as evidenced by 'the mischief to be remedied' as well as 'contemporaneous discussion' convinces us that justice to the Micronesians is not to be renounced simply to avoid even a brief additional lease on life for the Commission. Statutes that, for guidance of a governmental official's discharge of duties,

> propose 'to secure order, system, and dispatch in proceedings' are usually construed as directory, whether or not worded in the imperative, especially when the alternative is harshness or absurdity."

In discussing statutory time periods, Judge Wisdom of the 5th Circuit said, in *Fort Worth National Corporation* v. *Federal Savings and Loan Insurance Corporation*, 469 F2d 47, 58 (CA5 1972):

> "A satutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision . . .
>
> "Section 1730A(e) does not specify any particular consequence for failure to act within the time period. Nor is there anything in the legislative history indicating such an intent. We conclude, therefore, that the provision is directory . . ."

And in *Holbrook* v. *United States*, 284 F2d 747, 752 (CA9, 1960) the Court stated:

> "In the absence of direct evidence of legislative intent, a significant consideration in determining whether a statutory requirement should be given mandatory or directory effect is a comparison between the results to which each such construction would lead."

Great discretion is given courts in determining the application of statutes where a strict reading would result in a harsh result. The United States Supreme Court pointed out in *Sorrells* v. *United States*, 287 US 435, 446 (1932), quoting from *US* v. *Kirby*, 7 Wall 482:

> "All laws should receive a sensible construction. General terms should be limited in their application

as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason for the law . . . should prevail over its letter."

And in *U.S.* v. *American Trucking Association*, 310 US 534, 543 1939), the Court stated:

> "When the meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the Legislation as a whole' this Court has followed that purpose rather than the literal words . . . Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts."

Finally, in *Markham* v. *Cabell*, 326 US 404, 409 (1945), Court said:

> ". . . Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

It is clear from a close reading of 13 U.S.C. 141(b), (c) that the time limits adopted by Congress were directory. Congress intended to set up time limits so that reapportionment could go forth in an orderly manner. It is obvious that Congressional reapportionment cannot

be accomplished before the 1982 primary and general elections. Therefore, there is no absolute need to have accurate census figures for reapportionment until the latter part of 1981, or the early part of 1982, so as to meet early primary elections. It is also apparent that the distribution of federal funds to local units of governments can be delayed a reasonable time after April 1981 to obtain a more accurate census count, if such delay is necessary for that purpose.

Thus it appears that the dates of January 1, 1981, and April 1, 1981, are not mandatory. If it is necessary that the Census Bureau be given more time to arrive at a more accurate count at the state and sub-state levels so that accurate figures can be provided for the 39,000 local units of government, as well as each of the 50 states, a reasonable extension of time can be granted by this Court.

If the Census Bureau satisfies this Court that it is impossible to obtain accurate adjusted figures in time to meet the January 1, 1981, and April 1, 1981, deadlines, this Court has power to give an extension of time. Such extension would be based upon a clear and convincing showing of the necessity for the additional time and the methods to be used to accurately adjust the census.

VI

For the reasons given in this Opinion, a Judgment will issue embodying the following:

1. An injunction against defendants, enjoining them from certifying to the President on January 1, 1981, and to states and sub-state units of government on April 1, 1981, a population count based on the actual unadjusted headcount.

2. A mandatory injunction ordering defendants to adjust population figures for the 1980 census at the national, state, and sub-state level to reflect the undercount, and to adjust the differential undercount to prevent the known undercount of Blacks and Hispanics, as well as whites. The methods by which this adjustment shall be made shall remain within the discretion of the defendants so long as they are statistically defensible.

3. A Declaratory Judgment, declaring it to be the right of every person within the United States of America on April 1, 1980, to be counted in the census, and to direct that such a count be made to the extent it is statistically defensible.

4. An order to the bureau of the Census to report to this Court within thirty days from the date of this opinion the precise nature of its plan to implement the holdings of this Opinion.

If the defendants show to this Court by clear and convincing evidence that the adjustments ordered above cannot be made on or before January 1, 1981, and April, 1981, as required by statute, reasonable extensions of time for the making of such adjustments shall be ordered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52 F.R.C.P.

/s/ Horace W. Gilmore
United States District Judge

Dated: September 25, 1980.

JUDGMENT

United States District Court
Eastern District of Michigan
Southern Division

(Entered Sept. 30, 1981)

No. 80-71330

Coleman A. Young, et al., Plaintiffs, v. Philip M. Klutznick, et al., Defendants.

At a session of said Court held in the Federal Building, City of Detroit, Wayne County, Michigan on this day of Sept. 30, 1980.

Present: Honorable Horace Gilmore
District Judge

The above entitled action having come on to be heard in a bench trial before this Court, and this Court having heard all of the evidence, argument of counsel, and having reviewed the pleadings, orders in the file and all post-trial briefs and amicus briefs, and the Court having issued an Opinion and findings of fact and conclusions of law dated September 25, 1980 finding in favor of the Plaintiffs and granting relief against the Defendants as set forth below.

It is hereby ordered and adjudged:

1. That the Defendants are enjoined from reporting and/or certifying to the President on or about January 1, 1981, and to states and sub-state units of government on or about April 1, 1981, population counts based on the actual unadjusted headcount.

2. That the Defendants are ordered to adjust population figures for the 1980 census at the national,

state, and sub-state level to reflect the undercount, and to adjust the differential undercount to prevent the known undercount of Blacks and Hispanics, as well as Whites. The methods by which this adjustment shall be made shall remain within the discretion of the Defendants so long as they are statistically defensible.

3. That it is the right of every person within the United States of America on April 1, 1980, to be counted in the census, and to direct that such a count be made to the extent it is statistically defensible.

4. That the Defendants are to report to this Court within thirty (30) days of September 25, 1980 the precise nature of their plan to implement this Judgment within the parameters and findings of this Court's Opinion dated September 25, 1980.

5. That if the Defendants show to this Court by clear and convincing evidence that the adjustments ordered above cannot be made on or before January 1, 1981 and April 1, 1981, respectively, as required by statute, reasonable extensions of time for making such adjustments shall be ordered.

Horace W. Gilmore
District Judge

Waived notice of presentment
and approved over the phone by:
/s/ Sheila Lieber/ JAT
U.S. Justice Department
Room 3738
10th & Constitution, N.W.
Washington, D.C. 20350
(202) 633-3378

BENCH OPINION

In the United States District Court
Eastern District of Michigan
Southern Division

(Entered Oct. 30, 1980)

No. 80-71330

Coleman A. Young, et al., Plaintiffs, vs Philip M. Klutznick, et al., Defendants.

Proceeding had in the above--entitled cause before the Honorable Horace W. Gilmore, in Room 859 United States Courthouse, on Thursday, October 30, 1980.

Appearances: Mr. James Tuck, Mr. Robert A. Sedler, appearing on behalf of the Plaintiffs, Mr. Mark C. Rutzick, Ms. Sheila Lieber, appearing on behalf of the U.S. Justice Department, Mr. J. Patrick Heelan, appearing on behalf of the Department of Commerce.

. . . (63) the scientific way to deal with that is to count it to a zero undercount or no adjustment for the adjustment processing. So, it is absolutely incorrect that they cannot determine the Black/White differential. Since the Black/White differential goes to the heart of the constitutional obligation, they are required to determine the White differential as best they can. As this Appendix 9 indicates, they very well assume, they are assuming very clearly that they may have a zero White undercount. If that is so, then all that need be done is to adjust for the identified Black undercount and the identified Hispanic undercount.

Thank you, your Honor.

The Court: There are two matters before the Court, one is a Motion for a New Trial, or the Order

of Amended Judgment or in the Alternative for Relief from Judgment under Rule 59-A and 59-E and 60-B2 and 60-B6. Three grounds were stated on that Motion, one that a new factor now available from the Census Bureau showed that the undercount in the current Census as measured by conventional demographics techniques far lower than 1970 and may be close to zero due to absence of any measurable undercount demonstrated in those statistically defensible methods exist for adjusting (64) the decennial population and three, that the Court exceeded its authority in directing the Census Bureau.

The second part of their consideration today is the Report of the Director of the Census, Vincent P. Barabba, in response to the Court's Order that he report to this Court the precise nature of his plan to implement the program.

I think in starting, we need to first look at the Judgment in the case and see what we're dealing with specifically. The Judgment in this case, and I quote it said, "One, an Injunction against the Defendants enjoining them from certifying to the President on January 1, 1981 and to the States and sub-state units of government on April 1, 1981 a population count based on the actual unadjusted head count. Two, mandatory Injunction ordering the Defendants to adjust population figures for the 1980 Census at the national State and sub-state level to reflect the undercount and to adjust the differential undercount to prevent that no one undercount, Blacks and Hispanics as well as Whites. The method by which this adjustment shall be made shall remain within the discretion of the Defendants so long as they are statistically defensible. (65) Three, a Declaratory Judgment declaring that it be the right of every person within the United States of America on April 1, 1980 to be counted in a Census and to direct that

such count be made to the extent that it is statistically defensible. Four, an Order of the Bureau of the Census to report to this Court within thirty days from the date of this Opinion, the precise nature of this plan to implement the holdings of this Opinion and a final statement that, if the Defendant shows the Court by clear convincing evidence that the adjustments ordered cannot be made on or before January 1 and April 1, 1981, as required by Statutes, reasonable extensions of time for the making of such adjustments shall be ordered. Rule 59-A provides a new trial may be granted to all or any of the parties when all or part of the issues in an action tried without a Jury or any of the reasons for which rehearings have heretofore been granted in pursuit of equity in the Courts of the United States. On a Motion for a New Trial in an action tried without a Jury, the Court may open the Judgment if one has been entered, take additional testimony, amend findings of facts including the law or make new findings in conclusion and direct the entry of a new Judgment. 59-E provides (66) a Motion to Alter or Amend the Judgment shall not be served not later than ten days after the ending of Judgment. Rule 60-B quoted the relief from Judgments and states that on Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final Judgment Order of Proceedings for the following reasons to newly discovered evidence which by due diligence could not have been discovered in time to Move for a New Trial under Rule 59-B or 6. Any other reason justifying relief from the operation of Judgment. And there's one other Rule that must be considered in determining the disposition of the matter before the Court and that's Local Rule 9 covering Motions to Alter or Amend Judgment or for Rehearing for which provides generally

and without restricting the discretion of the Court, Motion for Rehearing which merely presents the same issues ruled upon by the Court either expressly or by reasonable implication will not be granted. The Movement must not only demonstrate a probable defect by which the Court and the parties have been mislead, but also that a different disposition of the case must result from the correction thereof."

Now, let's consider the Motion first. The first grounds for Motion either under Rule 60 or (67) Rule 59 is that new facts are now available and to show that the undercount is far lower than in 1970 and may be even close to zero and it's been requested that testimony be offered on that point today. Well, the Court is not going to take any testimony in this matter today. And I would say that certainly that is not a basis for a New Trial or Relief from Judgment under either Rule 59 or 60 nor does it come within the provisions of Rule 9 and 4 of the Local Court Rules. If that indeed be a fact and if that indeed be what happened, that there is no undercount, that can be reported to the Court in the final Census, it certainly is no basis for reoiening this case, If that's the case, fine, let the Census Bureau establish that and if they need more time after January 1 and April 1, to make the adjustment or to establish that there's not going to be any undercount, that can be done. And, it can be done within the framework of this opinion, certainly. It's certainly no basis for taking more testimony or for reopening this matter.

The second ground for a New Trial or for Relief from Judgment is a claim in the Defendant's Motion that the absence of any measurable undercount demonstrates no statistically defensible method exists (68) for adjusting the Decennial Census Population. And this conclusion is

buttressed by the correction of a number of erroneous facts or conclusions in the Court's Opinion of September 25, 1980.

Well, it appears to me in having heard this Motion and having looked at this matter that that is not supported in any way and I'm going to address that issue and I'm going to reserve my addressing of that issue until I come to addressing the issue of the Report filed by Mr. Barabba. I certainly will say now, though, that the ruling on the Motion for a New trial or relief from Judgment, that that does not provide any basis for relief.

The third thing is that the Court exceeded its authority in directing the Census Bureau to make a nationwide adjustment because the _____* of injury related solely to redistricting within Michigan and not to apportioning representatives among the States. I find that one very difficult to agree with. We sat here for fourteen days and took testimony on a national basis, arguing the case and extensive briefs were filed based upon Article 1, Section 2, Clause 3, upon the National Statutes. To suggest that we are merely dealing with Coleman Young and the City of (69) Detroit is to suggest that we spent an awful lot of time in a Federal Court receiving irrelevant material. There was a substatute claim in this, too, under Article 1, Section 2, Clause 3, that claimed that goes with the constitutional obligation to make an adjustment nationwide either one State or within States. They have been argued not only in the briefs filed, in the oral arguments and the Motions before Judgment. Recovery Judgment back last May but a great deal of testimony was directed to that. In fact, it appeared clearly to me that the Plaintiff clearly had standing to raise the issue, that this Court clearly had jurisdiction to decide the issue and it decided and

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* Omission in Court Reporter's transcribed copy.

rendered the judgment it did in a national way. Whatever affects Detroit cannot be considered in a vacuum; whatever affects Detroit must be looked at in relation to be effective on Cleveland, or Chicago or New York or Philadelphia or any other city in the United States. The Court is of the opinion that it clearly did not exceed its authority in rendering judgment.

Now for those reasons the Court will deny the Motion of Defendant for a New Trial or to Alter and Amend Judgment or an Alternative for Relief from (70) Judgment under Rule 59 and 60.

The second part of the Court's consideration, however, must deal with the Report filed by the Director of the Census. And I tell you with all respect at this point as I start to discuss this point, that I think the Census Bureau must realize that the duties and responsibilities of the Bureau of Census are entirely different from those of the United States District Court. And that there seems to be some confusion among the members of the Bureau of Census as to their relationship to a Court Judgment and a Court Order. I believe the law is, and if I'm wrong, I can be corrected that a Court Order, a United States District Court Order must be obeyed unless the Court itself stays that Order, unless the Order is appealed and reversed or unless the Order is appealed and a stay is granted by the Appellate Court. Now, in this case, none of those things have happened. The Report filed by the Director of the Census on October 27, pursuant to the Order of the Court causes me considerable consternation. At no time did this Court ever suggest that the Bureau's Report be an Appeal of the Judgment or a compilation of all the reasons why an adjustment could not be made. Every negative issue raised in this Report (71) and the Report is full of negativism, we cannot do this, we cannot do that, it's impossible to do

this, nothing will work. All of these issues were raised and considered by this Court, at least most of them. And, in consideration of that, I did issue the Injunction Ordering them to adjust it. And I left, because I thought it was the proper thing to do, the Census, they being the group of experts, I left them to come up with a statistically defensible method. And I did it in all good faith hoping that the Census Bureau would deal accordingly with equal good faith.

Now, the focus of the issue now is whether the Defendant could make an adjustment for an undercount in a statistically defensible method. That was litigated by this Court for fourteen days and decided by the Court. Now since that was done, unless there was an Appeal which then was stayed by either this Court or the Court of Appeals, which has not happened, it is the duty of the Census Bureau to extend its best good faith effort to develop a plan for the implementation of this Court's Order. Instead of doing that the Defendant now has sought in its report to displace and replace the Court's determination with its own seven part definition of statistical defensibility, (72) if there is such a word. But the Defendant does not touch in the report upon the heart of the controversy involved here namely the differential undercount. That is basically what this is all about. The mode of the conduct by the Bureau of Census in permitting this Report as I indicate is disturbing to the Court and I am very troubled by what I've received because I have not received what I consider to be compliance with my Order, namely the production of a statistically defensible method. I am receiving instead all kinds of other reasons why something can't be done.

Now I do not like to and I do not intend to, today take any sanctions of any kind for that. However, I'm going to do this. I'm not at this point going to direct any

particular method of adjustment. I'm going to, as requested by Mr. Tuck, and I think it's a fairly reasonable request give the Census Bureau one more chance for a bite of the apple, if you will. I will direct the Census Bureau to comply with the fourth part of my Judgment, namely, reporting to this Court the precise nature of its plan to implement the holdings of this Court. I will direct the Census Bureau to comply with that Order on or before one week from tomorrow, November 7, 1980. If the (73) Census Bureau does not comply and so that I am perfectly clear in what I am saying I'll read again what the Judgment says, An Order to the Bureau to Report to this Court within thirty days from the date of this Opinion the precise nature of its plan to implement the _____.* If that is not furnished this Court by November 7th, there are several alternatives which the Court will consider and will consider on November 7th. One alternative is for the Court itself to order, issue methods of justice. One alternative is to appoint an independent expert to accomplish methods for the undercount and one alternative which the Court is most reluctant to do is to use the methods available to this Court to enforce its order as I say, at this time, I cannot contemplate that because I expect the Census Bureau to realize that an Order in the United States District Court is made and it must be obeyed and I assume, unless I say it is stayed, appealed, or reversed. And therefore, for that reason I will deny the Motions for the reasons stated. I will deny the Motion for Rehearing, the Motion for a New Trial, the Motion for Altered or Amended Judgment, and the Motion for Relief from Judgment and I will direct that the fourth paragraph of the Judgment of this Court which I (74) have already read, be implemented by a Report on or before November 7, which is a week from tomorrow.

* Omission in Court Reporter's transcribed copy.

Mr. Rutzick: Your Honor, may I be heard?

The Court: You may.

Mr. Rutzick: I have a couple of matters that I want to raise. First of all, I want to state for the record that the Defendants never stipulated that this suit would have nationwide effect.

The Court: Sir, I do not want you to re-argue the Motion. If you have something to say with reference to the Order I just made I will hear that, but I am not going to get a re-argument of the Motion.

Mr. Rutzick: I am not re-arguing the Motion but I am stating and recognizing that I talked to Mr. Sedler to speak now if they can test —

Mr. Sedler: Your Honor, I object this procedure.

The Court: Let's just wait a minute. I gave everyone an opportunity for an argument and everyone indicated that they were through with argument. I am not going to argue the correctness of my decision and I am not going to argue on the corrections of my findings (75). If you have something to say with reference to the opinion just rendered by the Court I will be glad to hear that.

Mr. Rutzick: Yes. In view of the fact that the Court denied the Defendants an opportunity to present the oral testimony today, I would like to make an Offer of Proof for the record, your Honor.

The Court: All right. Go right ahead.

Mr. Rutzick: Thank you. First, I would like these two documents marked by any method that would be convenient as perhaps Defendant's A and B and would offer that these documents would be introduced into Evidence through the testimony of George Hall. Secondly, I would offer to prove through the testimony of Doctor Bailar the materials as substantially set forth in the report of the Census Bureau filed on October 27, 1980. Finally, your Honor, I would request a Stay of your

Judgment of September 30, 1980 and the Order orally delivered today, October 30, 1980 for the purpose of considering an Appeal of this Decision and (76) subsequently with the Solicitor General of the United States who in the Department of Justice has the authority to approve Appeals from orders of the United States District Courts.

Mr. Sedler: If your Honor please, the request for a Stay comes from Mr. Rutzick's words, but we do profit from under the form that is applicable due to the Stay. There is no prejudice to the Defendant.

Mr. Rutzick: Excuse me, your Honor, I'm not sure what we are doing now.

Mr. Sedler: We formally object to a Stay, your Honor, there are time constraints. At some point in time figures have to be reproduced in time for the use of reapportioning of the redistricting for the 1982 Congressional elections. There is no burden on the Defendants in complying with the Court's latest Order that it report to this Court specifically what it's going to do. If we had enough time to consider all of the options we merely have to say which of the options will not be accepted so that no burden whatsoever in complying with this Court's order to report.

After the Judgment itself it is not clear what the Defendants mean by the Stay. If we (77) look to what they said here, are they asking to go ahead and submit official population counts based on the raw, unadjusted data alone.

The Court: I assume, so we are clear, let's don't spend a lot of time. A stay would mean the same as my opinion, it would have no effect whatever until the solicitor General had decided whether to Appeal or not. Let's not argue what the Stay is.

Mr. Sedler: Well, the only point is there can be no way that they can go ahead and submit the raw, unadjusted data.

The Court: I'm tired, you're tired, we're all tired. He wants a Stay. What a stay means is that Judgment cannot be put into effect until the Stay is granted. Therefore, they're in the same position as if no Judgment had been granted.

I assume that's what you're talking about, is that right?

Mr. Sedler: Correct. My point is that this would be causing damages to the Plaintiff because they would then go ahead and be free since they were not asked to comply with Paragraph one, to submit an official population count on January 1 and April 1 respectively. More (78) significantly, as I have said, the time up front where figures are more available for use in the 1982 Congressional reapportionment and redistricting. They say they are going to put the methods in operation anyhow to evaluate "coverage." There is nothing extra that they are required to do that they are not now doing. I don't know what possible basis there could be for a Stay of the Judgment. Secondly, it has been over a month since the Judgment has been rendered. If there was some damage to the Defendants they could have asked for a Stay earlier. It seems to be no basis for a Stay. Assuming the correctness of the Court's Judgment, comparing the virtually non-existent burden on the Defendants in complying with the Court's Judgment against the Constitutional processes and ultimately to the Census itself, ultimately the Census figures must be available for use and redistricting, that would warrant the Stay.

In addition, they talked about consultation with the Solicitor General. It has been a month now where they have had the opportunity to consult with the Solicitor

General and to certainly make a decision as to whether or not to appeal. Be that as it may, I don't think that has anything to do, the (79) possible consultation is not relevant to the question of the Stay. There must be a basis for a Stay under applicable principles of law and I respectfully submit under applicable principles of law they can show no basis for a stay.

The Court: Do you want to respond to that?

Mr. Rutzick: Yes.

First of all, to make it clear the Stay is if the Order had never been granted and the Stay would permit the Census Bureau to proceed about its statutory business as if the Order of this Court had never been entered. That certainly does exactly what we see.

We request a Stay particularly in light of the Court's Order of this afternoon. The Court had ordered the Census Bureau to do something which it has already advised the Court it cannot do. The Census Bureau will file another Report on November 7th. But the Bureau has already told the Court that it has come to the conclusion in its judgment that it knows of no particularly defensible method and you are not going to get any different answer a week from today, your Honor. And in light of the alternatives, the (80) unfortunate alternatives particularly need a Stay of your Honor's Order in order to avoid the consequences that we see that are very likely to arise in the filing of the next Report on November 7th. We can see no prejudice arising to the Plaintiff from a Stay for a limited period of time and we seek a limited stay pending the decision whether they are going to appeal this case due to the statement which they made today.

Mr. Rutzick: We ask a stay for a short period of time if the Court will not grant us a Stay pending Appeal.

The Court: The matter of a Stay under the District

Court and the Rules of the Court, the Appellant may go to the Circuit Court or to a Judge thereof. Now, their question is whether is [*sic*] exercising its discretion as to grant a Stay in this matter and of course, there are many, many factors that must be considered. The undue harm to the Defendant if it is not granted and the undue harm to the Plaintiff pending the Stay, you have to look hard at the winning and losing parties. The Judgment in this case was rendered September 25, some thirty-five days ago and the Judgment was entered September 30, thirty days ago. Motions heard today were timely filed. I think the basic thing (81) that this Court must be considering, if a Stay is granted we are back to square one and nothing will be done with reference to solving a very serious and difficult problem and getting an accurate Census count. We are necessarily up against deadlines, they are statutory and there is one January 1st and April 1st. Even if the Court could extend the April 1st deadline it still cannot extend it too far because there have to be accurate figures for the 1982 Congressional allotments. Therefore, it seems to me if the Court stays this that the Court will be imposing a great burden on the Plaintiffs and I do not see any burden at all on the Defendants in complying with this Order. All I have asked the Defendants to do is to tell me how they are going to adjust if they have to if the Defendants' statement that they have made come through, namely that there is no need for adjustment that we have counted everyone, there is no harm done. It is all denied.

Mr. Rutzick: Your Honor, would you at least grant a Motion for a short period of time? Two weeks for the purpose of allowing this decision to be made and the filing dates for the supplemental reports be moved to November 14th.

Mr. Sedler: I have no problem with (82) that.

The Court: All right. I'll grant that. I will ask you to appear on November 14th. I would like that filed at least the day before so I will have an opportunity to look at it. File it on November the 13th.

Thank you.

(Whereupon the matter was concluded.)

ORDER DENYING DEFENDANTS' MOTIONS FOR POST TRIAL RELIEF AND DENYING DEFENDANTS' MOTION TO STAY AND GRANTING ADDITIONAL RELIEF

United States District Court
Eastern District of Michigan
Southern Division

(Entered Oct. 31, 1980)
No. 80-71330

Coleman A Young, et al., Plaintiffs, v. Philip M. Klutznick, et al., Defendants.

At a session of said Court held in the United States District Court, Eastern District of Michigan, Southern Division, Detroit, Michigan this 31st day of October, 1980.

PRESENT: Honorable Horace Gilmore
District Judge

On October 10, 1980 the Defendants filed a "Motion to Alter or Amend Judgment, or in the Alternative, for a New Trial" under Federal Rules of Civil Procedure 59.

The Court set this Motion for Hearing for October 24, 1980 by this Court's Order of October 20, 1980.

Based on an agreement of counsel, the Hearing on this case was reset for Thursday, October 30, 1980.

Subsequent to that time the Defendants on October 27, 1980 filed a "Motion for Relief from Judgment" under Federal Rules of Civil Procedure 60.

On October 27, 1980 the Director of the Census Bureau, Vincent Barabba, filed a "Report of the United States Bureau of the Census in Response to Judgment of the Court Entered September 30, 1980."

On October 30, 1980 Plaintiffs submitted briefs and a response to the Bureau of Census' report and a demand for relief.

On October 30, 1980 this matter came before this Court for Hearing and oral argument and the Court being fully aware of the premises and having reviewed all written materials presented to the Court on this matter and having listened to oral argument, dictated an oral Opinion and ruled on the various Motions and demands for relief before this Court.

On October 30, 1980 the Defendants made an oral motion for a stay of my oral Opinion of October 30, 1980 and the Judgment of September 30, 1980.

THE COURT RULES AND ORDERS AS FOLLOWS:

That the Defendants' Motion for a New Trial, to Alter or Amend Judgment, or in the Alternative, for a New Trial is hereby denied,

That the Defendants' Motion for Relief from Judgment is hereby denied.

That pursuant to this Court's Opinion and findings of October 30, 1980 and pursuant to its prior Judgments and Opinions in this case, the Defendants are ordered on or before November 13, 1980 to comply with Paragraph Four (4) of this Court's Judgment of September 30, 1980

and with my Opinion orally dictated from the bench on October 30, 1980 by submitting a plan consistent with my Opinions and Orders issued heretofore.

That the Defendants' oral motion for a stay from both this Order and my Judgment of September 30, 1980 is denied.

HORACE GILMORE

APPROVED AS TO FORM:

Ms. Sheila Lieber
Room 3738
U.S. Justice Department
10th and Constitution, N.W.
Washington, D.C. 20350

POST JUDGMENT ORDER DEFINING DEFENDANTS' PLAN TO IMPLEMENT THE COURT'S OPINIONS, ORDERS AND JUDGMENT, AND ESTABLISHING DATES FOR CARRYING OUT DEFENDANTS' PLAN

United States District Court
Eastern District of Michigan
Southern Division

(Entered Dec. 15, 1980)

No. 80-71330

Coleman A. Young, et al., Plaintiffs, v. Philip M. Klutznick, et al., Defendants.

At a session of said Court held at the Federal Building, in the City of Detroit, Michigan on December 15, 1980.

Present: Honorable Horace W. Gilmore
District Judge

Judgment was entered on September 30, 1980, following the Court's Opinion of September 25, 1980.

On October 30, 1980, the Court made additional findings and an Order dated October 31, 1980 was entered.

On November 13, 1980, Director Barabba submitted a plan to the Court.

On November 14, 1980, a hearing was held to review this plan.

On December 2, 1980, the Census Bureau Reporting Agreement negotiated between the parties was presented to the Court for approval.

On December 2, 1980, a hearing was held relative to several issues relating to the implementation of the Court's orders.

Based on the evidence in this cause, the compliance reports submitted by Director Barabba, all hearings held in this matter since entry of Judgment and the Census Bureau Reporting Agreement identified above, the Court makes the following findings and orders:

I. IMPLEMENTATION OF UNDERCOUNT ADJUSTMENT

The Defendants are ordered to implement the Court's Judgment by Adjusting population totals in the following manner:

1) The Defendant, as soon as is reasonably practicable, but not later than September 30, 1981, will select undercount rates on which to base an adjustment of Census data.

2) The Defendants, as soon as is reasonably practicable, but not later than September 30, 1981, will determine undercount adjustment rates for Blacks, Hispanics and all other groups combined. The selection and determination defined in Section I Paragraphs 1 and 2 herein shall be derived from the results of the Undercount Adjustment Plan.

3) Utilizing the rates selected and determined pursuant to Section I Paragraphs 1 and 2, the Defendants will report, as soon as is reasonably practicable, but not later than September 30, 1981, adjusted population totals for the States *only*.

4) Utilizing the rates selected and determined pursuant to Section I Paragraphs 1 and 2, the Defendants, as soon as is reasonably practicable, but no later than November 30, 1981 will compute and make available adjusted population totals for all places below state level, down to the block level.

II. UNDERCOUNT ADJUSTMENT PLAN

In accordance with the Bureau of Census Report of November 13, 1980, the Defendants shall utilize their three coverage evaluation studies to produce estimates of undercount rates and to compute adjusted national, state and substate population totals. These studies include Demographic Analysis, CPS-IRS Match and the Post-Enumeration Program. These adjusted population totals shall be as accurate and precise as is mathematically and scientifically possible.

III. REPORTS ON AND RESULTS OF THE UNDERCOUNT ADJUSTMENT PLAN

The Defendants are ordered to provide the Court and the Plaintiffs reports on and results from the Undercount Adjustment Plan in the following fashion and on the following timetable:

1) The Census Bureau will submit a report by December 31, 1980, containing a detailed description of each of the three coverage evaluation studies which comprise the basis of the Undercount Adjustment Plan — Demographic Analysis, CPS-IRS Match and Post-Enumeration Program (PEP). This report will describe the manner in which each of the studies is being implemented and how undercount estimates will be derived from each study.

2) By March, 1981, the Bureau will submit a supplemental report containing a detailed description of the plan for the analysis and evaluation of the undercount estimates derived from each study, and a plan for evaluating the results of all the studies together.

3) The December 31, 1980 report and the March 1981 report shall set forth detailed target dates, if any, for completion of various phases of the plans and studies reported therein. If it becomes necessary to modify significantly the target dates, a revised schedule will be provided in a prompt and timely manner.

4) If, at any time prior to September, 1981, the Bureau develops a plan for obtaining the

ultimate or final account adjustment rates, it will submit a report containing a detailed description of the techniques to be applied in obtaining and deriving final undercount adjustment rates to be utilized to carry out the Judgment of the Court dated September 30, 1980.

5) Subject to the confidentiality provisions set forth below, when the results of each evaluation study become available, the Bureau will submit a detailed report setting forth the undercount rates derived from that study and all relevant supporting data. The results of the Demographic Analysis study shall be provided in February, 1981. The results of the CPS-IRS Match study shall be provided in March, 1981. As soon as the results of the PEP study become available, they shall be provided.

6) The information described in Section III Paragraph 5 herein shall be provided only to Plaintiffs' counsel and shall be for the exclusive use of Plaintiffs' counsel and such expert consultants as they may designate in writing. Plaintiffs' counsel shall advise the Bureau promptly of their designation of such expert consultants. Neither Plaintiffs' counsel nor such designated expert consultants shall disclose this information to any other person without either (1) prior written authorization from the Bureau or (2) an order from the Court issued upon written motion filed with timely notice. The reports described in Section III Paragraph 5 herein shall be filed with the Court *in camera* and shall not be made part of the public report except upon prior notice to the parties and upon

such terms as may be just. Once a report for a particular study is issued by the Census Bureau under the terms of Section III Paragraph 7, the results previously reported under Paragraph 5 for said study shall no longer be restricted by terms of Section III Paragraph 6.

7) As soon as the Bureau compiles an analysis and evaluation of the results relating to the quality and limitations of the estimates from *each* study, including quantitative measures (e.g., coefficients of variation), when available, the Bureau will report in detail the results of its analysis and evaluation. These detailed reports describing the analysis and evaluation of these studies shall be provided as following: (1) Demographic Analysis — April, 1981; (2) CPS-IRS Match — April, 1981; (3) PEP — September, 1981; and (4) ultimate and final undercount adjustment rates — September, 1981.

8) In addition, the Bureau will submit an interim report on June 1, 1981, covering the status of the entire adjustment program and any assessment of the program which can be made at that time.

9) Although estimates derived from the three component studies will be provided as they become known, these estimates may be subject to further review and evaluation by the Census Bureau at any time until Bureau selects final adjustment rates in September, 1981. Consequently, any judgment expressed prior to September, 1981 should be considered preliminary and subject to review and change. In the event unanticipated events interfere with

the Bureau's ability to meet the timetables set forth above, the Bureau will notify in a prompt and timely manner the Court and either James A. Tuck, Esq. or Robert A. Sedler, Esq.

10) The Bureau will consider request from counsel for supplemental information in addition to the materials provided by this agreement and described herein and in the Report of November 13, 1980.

IV. EXTENSION OF DEFENDANTS' REPORTING DEADLINES

The Court finds, based on representations of the Defendants, that the Defendants will not be able to develop undercount adjustment rates and make an adjudgment for the undercount that is statistically defensible or mathematically and scientifically accurate and precise unless they are able to obtain the results of all three of their coverage evaluation studies. The Court further finds, based on representations of the Defendants, that the Defendants must be provided sufficient time to analyze and evaluate the results of these studies and utilize this information to obtain adjusted population totals for the national, state and substate levels.

The Court finds, based on representations of the Defendants, that the selection and determination of undercount adjustment rates and computation of adjusted state population totals cannot be obtained prior to September, 1981 and that adjusted substate population totals cannot be obtained prior to November, 1981.

Thus, to insure that adjusted population totals are as accurate and precise as the Defendants can make them,

consistent with present scientific knowledge and to insure that the Constitutional obligations of Art. 1, Sec. 2, Cl. 3 are implemented the Court finds as follows:

1. It is necessary and reasonable to extend the Defendants' obligation to report state population totals from January 1, 1981 until no later than September, 1981.

2. It is necessary and reasonable to extend the Defendants' obligation to report substate population totals from April 1, 1981 until no later than November, 1981.

V. SCHEDULE OF HEARINGS BEFORE THE COURT

The parties, through counsel, will report before the Court, prepared to assist the Court in monitoring the Defendants' undercount adjustment plan and answer questions raised by Defendants' submissions and reports as follows:

1) January 15, 1981	2:00 p.m.
2) April 9, 1981	2:00 p.m.
3) June 4, 1981	2:00 p.m.
4) October 8, 1981	2:00 p.m.
5) December 3, 1981	2:00 p.m.

Horace W. Gilmore
District Judge

Approved as to form:
Mark Rutznick
Sheila Lieber
Attorneys for Defendants

ORDER

United States Court of Appeals
for the Sixth Circuit

(Entered Dec. 3, 1980)
No. 80-1751

Coleman A. Young, et al., Plaintiffs-Appellees, v Phillip M. Klutznick, et al., Defendants-Appellants.

Before: Weick, Lively and Jones, Circuit Judges

Appellants move, for a stay of the district court's Orders pending appeal pursuant to Rule 8(a) Fed. R. App. P., and for an expedited appeal. On September 30, 1980, the district court enjoined the appellants from certifying to the President by December 31, 1980, the census of population, as required by 13 U.S.C. § 141(b), without first adjusting these figures for the undercount. On October 31, 1980, the district court ordered appellants to file a "statistically defensible" standard for adjusting the official census of population by November 13, 1980, and denied appellants' motion for a stay pending appeal. Appellants' motion for a temporary stay of the October 31, 1980 Order was denied by this Court on November 7, 1980.

A stay pending appeal will only be granted if appellants show that on balance the following factors weigh in their favor:

1) likelihood of success on the merits,

2) irreparable injury to the movant in absence of a stay,

3) no irreparable injury to other interested parties, and,

4) the public interest lies with the movant.

Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). This is the standard applicable in this Circuit. *Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Commission*, 337 F.2d 221, 222 (6th Cir. 1964).

Appellants have not shown in light of these factors that issuance of a stay pending appeal would be appropriate. The district court's orders can only be stayed if appellants can show a likelihood of success. The district court was supported by a well-reasoned opinion. We cannot say that appellants demonstrated a likelihood of success.

When we balance the other three factors we do not believe that appellants presented sufficient proof to permit us to grant a stay pending appeal.

However, we believe the issues involved are significant. Therefore, we grant the motion to expedite this appeal to the February 1981 term.

IT IS SO ORDERED.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

ORDER OF JUSTICE STEWART

Supreme Court of the United States

(Entered Dec. 24, 1980)
No. A-533

Philip M. Klutznick, et al., Applicants v. Coleman A. Young, et al.,

UPON CONSIDERATION of the application of the Solicitor General and the opposition filed thereto,

IT IS ORDERED that the order of the United States District Court for the Eastern District of Michigan, No. 80-71330, entered September 30, 1980, be, and the same is hereby, stayed pending final disposition of the appeal before the United States Court of Appeals for the Sixth Circuit.

/s/ Potter Stewart
Associate Justice of
the Supreme Court of the United States

Dated this 24th day of December, 1980

ORDER ON REHEARING

United States Court of Appeals
for the Sixth Circuit

(Entered Sept. 22, 1981)

Nos. 80-1751, 81-1027

Coleman A. Young, et al., Plaintiffs-Appellees, v. Philip M. Klutznick, et al., Defendants-Appellants.

Before: Keith, Merritt and Martin, Circuit Judges.

The plaintiffs-appellees have filed a petition for rehearing with suggestion for rehearing en banc. No judge in active service on the court having requested consideration en banc, the petition for rehearing has been referred to the panel which heard the appeal.

Upon consideration of the petition, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this panel.

The petition for rehearing is denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

COMPLAINT

United States District Court
Eastern District of Michigan

(Filed April 1, 1980)
No. ——

Coleman A. Young, et al., Plaintiffs, vs. Philip M. Klutznick, et al., Defendants.

The plaintiffs, for their complaint, allege as follows:

1. The jurisdiction of this Court over the case arises pursuant to 28 U.S.C. §§ 1331, 1337, 1361, 2201 and 2202, and pursuant to 5 U.S.C. § 702. The amount in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs. This is a proceeding in equity, to redress the violation of rights guaranteed by the Constitution of the United States, in particular Art. I, § 2, cl. 3, and the Fifth Amendment thereto, and the laws of the United States relating to the taking of the decennial census and to the apportionment of Representatives in the House of Representatives, in particular 13 U.S.C. §§ 1 *et seq*, and 2 U.S.C. § 2a.

2. Plaintiff, Coleman A. Young, is a citizen of the United States and the State of Michigan and a resident and registered voter of the City of Detroit. He is also the duly elected and acting Mayor of the City of Detroit. He sues individually and in his capacity as Mayor of the City of Detroit. Plaintiff, City of Detroit, is a municipal corporation organized pursuant to the laws of the State of Michigan, Mich. Comp. L. Ch. 17, and having the capacity to sue and be sued.

3. Defendant, Philip M. Klutznick, is the duly appointed and acting Secretary of Commerce of the

United States. Defendant, Vincent P. Barabba, is the duly appointed and acting Director of the United States Bureau of the Census [hereinafter referred to as the "Bureau"], pursuant to 13 U.S.C. § 21. On the basis of information and belief, it is alleged that, pursuant to 13 U.S.C. § 4, the defendant Klutznick has delegated to the defendant Barabba the performance of all functions and duties relating to the 1980 decennial census that have been imposed by law on the Secretary of Commerce, the Department of Commerce, and the Bureau.

4. In accordance with the requirements of Art. I, § 2 cl. 3 of the Constitution, the Congress has provided by law for the taking of a decennial census of the population of the United States. 13 U.S.C. §§ 1 *et seq*. Pursuant to 13 U.S.C. § 141, the Secretary of Commerce is directed to take such decennial census of the population as of the first day of April, 1980, said date to be known as the "decennial census date," and every ten years thereafter, which responsibility with respect to the taking of the 1980 decennial census, it is believed that the defendant Klutznick has delegated to the defendant Barabba, as aforesaid.

5. The tabulation of the total population by states as required for the apportionment of Representatives in Congress among the several states must be completed within nine months of the census date and reported by the Secretary to the President. On the basis of information and belief, it is alleged that the defendant Klutznick has directed the defendant Barabba to report the total population by states to him during the month of December, 1980.

6. Pursuant to 2 U.S.C. § 2a, the President is required, within one week of the convening of the first regular session of the next Congress in January, 1981, to

transmit to the Congress a statement showing the whole number of persons in each state, as ascertained under the decennial census of the population, and the number of Representatives in the House of Representatives to which each state would be entitled under an apportionment of the presently-existing number of Representatives by the method known as the method of equal proportions, no state to receive less than one Member.

7. The defendants are also required, in accordance with the established practice of the Bureau, and the provisions of 13 U.S.C. § 141(c), to prepare and certify an official count of the population of cities and other governmental sub-units within each state. The official count of such cities and sub-units, as prepareed and certified by the Bureau, is and must be used by the states to apportion Congressional districts within each state in accordance with the requirement of Art. 1, § 2, cl. 3, that all Congressional districts within a state contain, as nearly as is practicable, equal number of persons.

8. In the State of Michigan, pursuant to Michigan Const., Art. IV, §§ 2, 3, the apportionment of state senatorial and legislative districts is based on the population of each district, as contained in the official count prepared and certified by the Bureau in connection with the decennial census.

9. In the apportionment of Congressional districts within the State of Michigan following the 1970 decennial census, five of the nineteen Congressional Districts allocated to the State of Michigan, the 1st, 13th, 14th, 16th, and 17th, embrace all or part of the City of Detroit. In the apportionment of state senatorial and legislative districts in the State of Michigan following the 1970 decennial census, 7 of the 38 state senatorial

districts, and 21 of the 110 state legislative districts embrace all or part of the City of Detroit.

10. The Congress has established numerous programs of federal grants-in-aid to states, cities, and other sub-units that are based on the population of said states, cities, and sub-units, as contained in the official population count prepared and certified by the bureau in connection with the decennial census, and/or in connection with the mid-year census authorized under 13 U.S.C. § 141 and the collection and publication of general population data authorized under 13 U.S.C. § 181. Among such programs are State and Local Fiscal Assistance (general revenue-sharing), 31 U.S.C. § 1221 *et seq.*, and Comprehensive Employment and Training, (CETA), 29 U.S.C. §§ 801 *et seq.*, from the plaintifff, City of Detroit, received $39,941,407 and $86,013,425, respectively, during the last fiscal year. In addition, the State of Michigan allocates various funds to cities, including plaintiff, City of Detroit, and other sub-units within the state, based on their population according to the official population count prepared and certified by the Bureau. Among such funds are State Revenue Sharing, from which the plaintiff, City of Detroit, received $113,509,954 during the last fiscal year, and State Gas and Weight funds, from which plaintiff, City of Detroit, received $30,653,000 during the last fiscal year. As a consequence, the amount of federal and state funds to be received by plaintiff, City of Detroit, in the years following the 1980 decennial census will be affected substantially by the official population count of the City of Detroit that is prepared and certified by the Bureau.

11. It has long been recognized by officials of the Bureau, including the defendant Barabba, that the procedures employed by the Burea in conducting the

decennial census, no matter how conscientiously and efficiently administered by the employees of the Bureau, will necessarily fail and in the past necessarily have failed, to enable employees of the Bureau to personally contact and record substantial numbers of persons actually residing in the United States.

12. The Bureau has been able, through the use of demographic projection, looking to birth, death, and migration statistics and other factors, to make a demographically valid determination of the actual population of the United States as of the census date. The difference between the Bureau's determination of the actual population of the United States as of the census date, and the number of persons personally contacted and recorded by employees of the Bureau during the taking of the census, indicates the approximate number of persons who were not personally contacted and recorded during the taking of the census. During the taking of the 1970 decennial census, the Bureau concluded that there were approximately 10.2 million persons, actually residing in the United States, who were not personally contacted and recorded during the taking of the census. Of these 10.2 million persons, 4.9 million were included in the official count of the population of the United States by a method known as "imputation," and thus were allocated to the states, cities and sub-units of the United States as if they had been personally contacted and recorded during the taking of the census. The remaining 5.3 million persons, referred to by the Bureau as constituting the census undercount, were not included in the official count of the population of the United States by means of "imputation" or other demographic or statistical methods, and thus were not allocated to the official population count of states, cities, and other sub-units of the United States.

13. In the 1970 decennial census, there was an undercount of 2.5% of the determined actual population of the United States. In the 1960 decennial census, there was an undercount of 2.7% of the determined actual population of the United States.

14. The groups of undercounted persons consisted disproportionately of non-whites, who in turn reside disproportionately in large cities. Blacks, in particular, were undercounted in substantial dispropotion to Whites and, according to the Bureau's determination, in the 1970 decennial census, 7.7% of all Blacks residing in the United States were undercounted, in comparison to 1.9% of all Whites residing in the United States.

15. The Bureau had determined, no later than the 1960 decennial census, that the groups of undercounted persons were not distributed evenly among the states, cities and sub-units of the United States. Because of the existence of the census undercount and its uneven distribution among the states, cities and sub-units of the United States, as aforesaid, the official count of the population of the states, cities and sub-units of the United States, as prepared and certified by the Bureau with respect to both the 1960 and the 1970 decennial census, did not enumerate the actual population of the states, cities, and sub-units of the United States, either absolutely, or in relation to each other. The actual population of Michigan, which has a relatively large urban and non-white population, was underreported in relation to the actual population of states having a relatively smaller urban and non-white population. The actual population of Detroit, a large city having a relatively large non-white population, likewise was underreported in relation to smaller cities and/or cities having a relatively smaller non-white population.

16. As a result of the underreporting of the actual population of some states in relation to the actual population of other states in the official population count prepared and certified by the Bureau and transmitted to the Secretary of Commerce, the report of the Secretary of Commerce to the President of the "tabulation of the total population by states," in connection with the taking of the 1970 decennial census, as required by 13 U.S.C. § 2a, showing the "whole number of persons" in each state and the number of Representatives to which each state would be entitled under the equal proportions method, did not in fact show the "whole number of persons" in each state, either absolutely or in relation to each other, and could not in fact show the number of representatives to which each state properly would be entitled under the equal proportions method based on the actual population of all of the states in relation to each other.

17. Because of the existence of the census undercount and its uneven distribution among the cities and sub-units of the United States, the official population count of the City of Detroit, which was reported in the 1970 decennial census as being the fifth largest city in the United States, as having seven times the population of any other city in the State of Michigan, and as having a non-white population of 44.5%, underreported the actual population of the City of Detroit in relation to the actual population of other cities and sub-units in the State of Michigan, all of which except one had a smaller percentage of non-white population than the City of Detroit. Consequently, in the allocation of Congressional districts within the State of Michigan, and in the allocation of state senatorial and legislative districts, the residents of the City of Detroit received less proportionate representation in the United States House of Representatives and in the Michigan Senate and

House of Representatives than the residents of the cities and sub-units in the State of Michigan having a smaller non-white population, the official population count of which more accurately reflected their actual population than did the official population count of the City of Detroit.

18. Because of the existence of the census undercount and its uneven distribution among the cities and sub-units of the United States, the Bureau's official population count of cities and sub-units underreported the actual population of large cities having a relatively large non-white population, such as the City of Detroit, in relation to the actual population of smaller cities and/or cities having a relatively smaller non-white population. Consequently, in the allocation of federal funds based on the population of cities and sub-units, as contained in the official population count prepared and certified by the Bureau in connection with the decennial census, the City of Detroit received substantially less federal funds than the proportional amount it was entitled to receive according to law. The City of Detroit likewise received less of the funds allocated to cities and sub-units by the State of Michigan according to the official population count of cities and sub-units prepared and certified by the Bureau, then it was entitled to receive according to state law.

19. The Constitution and laws of the United States impose upon the Secretary of Commerce and the Director of the Bureau of the Census, the defendants herein, the duty to make a tabulation of the total population of the United States, and of every state, city and sub-unit of the United States that includes all persons found by the Bureau to actually reside in the United States and reasonably capable of being determined to reside within

each state, city, and sub-unit of the United States at the time of the taking of the decennial census, even if such persons have not been personally contacted and recorded by employees of the Bureau during the taking of the decennial census.

20. Notwithstanding the existence of such duty imposed by the Constitution and laws of the United States, the Director of the Bureau refused to make such a tabulation as aforesaid in connection with the 1970 decennial census, as his predecessor in office had refused to do in connection with the 1960 decennial census. Instead the Director made a tabulation that did not allocate to the respective states, cities and sub-units of the United States some 5.3 million persons found to actually reside in the United States at the time of the taking of the 1970 decennial census.

21. Notwithstanding that the Bureau has been able, through the use of demographic projection, to make a demographically valid determination of the actual population of the United States, as aforesaid, and notwithstanding that the Bureau has been able, by means of "imputation," to include and allocate substantial numbers of persons who were not personally contacted and recorded during the taking of the decennial census, the Bureau has not developed on its own, despite the extensive resources available to the Bureau, demographic and statistical techniques by which the census undercount could be allocated to the states, cities, and sub-units of the United States, so that the official population count of the states, cities, and sub-units of the United States, as prepared and certified by the Bureau, would reflect, as nearly as is practicable, their actual population, both absolutely and in relation to each other, as required by the Constitution and laws of the United States.

22. Notwithstanding this failure on the part of the defendant Barabba, as Director of the Bureau, and his predecessors in office, to take such action necessary to the performance of their constitutional and statutorily-imposed duty, demographic and statistical techniques by which the census undercount could be allocated to the states, cities, and sub-units of the United States have been developed and utilized and have been made available to the defendant Barabba and to the Bureau for use in connection with the 1980 decennial census.

23. One such technique, as aforesaid, is the "synthetic" method, which is a statistical technique for distributing the undercount of a larger geographical area over a smaller geographical area. Under the "synthetic" method, the national undercount, as determined by the Bureau for specific race/age/sex groups, is allocated to the states, cities and sub-units of the United States, based on the Bureau's reported count of the specific race/age/sex groups for the particular state, city and sub-unit. Illustratively, since the Bureau determined that Black males between the ages of 20 and 24 were undercounted in 1970 decennial census at a rate of 12.1% while White males in that age group were undercounted at a rate of 2.5%, the reported count of Black males between the ages of 20 and 24 for every state, city and sub-unit is increased by 12.1%, while the reported count of White males in that age group is similarly increased by 2.5%. The same kind of allocation can be made for all of the other race/age/sex groups included in the national undercont. Thus, the total number of persons allocated to the states, cities and sub-units under the "synthetic" method would equal the total number of persons contained in the ntional undercount, as determined by the Bureau.

24. The breakdown of the undercount and its allocation to the states, cities and sub-units of the United States under the "synthetic" method indicates that in the 1970 decennial census, the City of Detroit was undercounted by approximately 4.2%, so that the actual population of the City of Detroit, following the allocation of the undercount, would be 1,578,412, rather than 1,511,482, as contained in the Bureau's official population count.

25. Since there are demographic and statistical techniques, particularly the "imputation" method, which was used to allocate some 4.9 million persons who were not personally contacted and recorded by employees of the Bureau during the taking of the 1970 decennial census, as aforesaid, and the "synthetic" method, by either of which the census undercount can be allocated among the states, cities, and sub-units of the United States, the undercount can in fact be included in the official count of the population of the United States by states and in the official population count of the cities and sub-units of the United States, to be prepared and certified by the defendants in connection with the 1980 decennial census and otherwise, in accordance with law.

26. The defendants and other appropriate officials of the Bureau know or should know, that an official count of the population of the states, cities and sub-units of the United States with the undercount included and allocated as aforesaid is a more accurate enumeration of the actual population of the states, cities, and sub-units of the United States than an official population count in which the undercount is not included and allocated as aforesaid.

27. On the basis of information and belief, it is alleged that the defendant Barabba and the appropriate

officials of the Bureau have determined that the numbers of persons actually residing in the United States as of the 1980 census date that will not be personally contacted and recorded by employees of the Bureau during the taking of the 1980 decennial census will be at least the same, and in all likelihood greater, than the number of persons actually residing in the United States that were not personally contacted and recorded during the taking of the 1970 decennial census.

28. The defendants have refused and continue to refuse to direct the inclusion and allocation of the undercount in the official count of the United States, and of the states, cities and sub-units of the United States, to be prepared and certified by the Bureau for the 1980 decennial census.

29. As a result of the refusal of the defendants to include and allocate the undercount among the states, cities and sub-units of the United States, as aforesaid, the following consequences will ensue in connection with the 1980 decennial census in the same manner as they ensued in connection with the 1970 decennial census:

(a) The report of the Secretary of Commerce to the President of the "tabulation of the total population by states," as required by 13 U.S.C. § 141, will not in fact contain a tabulation of the actual population of the states, either absolutely, or in relation to each other; (b) The statement submitted to Congress by the President, pursuant to 2 U.S.C. § 2a showing the "whole number of persons" in each state and the number of Representatives to which each state would be entitled under the equal proportions method, will not in fact show the "whole number of persons" in each state, either absolutely or in relation to each other, and cannot in fact show the

number of Representatives to which each state properly would be entitled under the equal proportions method based on the actual population of all of the states in relation to each other;

(c) In the allocation of Congressional seats within the State of Michigan, and in the allocation of state senatorial and legislative districts, the residents of the City of Detroit will receive less proportionate representation in the United States House of Representatives and in the Michigan Senate and House of Representatives than the residents of other cities and sub-units in the State of Michigan having a smaller non-white population than the City of Detroit;

(d) In the allocation of federal funds based on the population of cities and sub-units, as contained in the official population count prepared and certified by the Bureau, the City of Detroit will receive less than the proportionate amount of federal funds that it is entitled to receive according to law, and the City of Detroit will likewise receive less of the funds allocated to cities and sub-units by the State of Michigan according to the official population count of cities and sub-units prepared and certified by the Bureau, than it is entitled to receive according to state law.

30. The refusal of the defendants to include and allocate the undercount among the states, cities and sub-units of the United States following the taking of the 1980 decennial census, is violative of the Constitution and laws of the United States for the following reasons among others:

(a) Art. 1, § 2, cl. 3, and the laws of the United States relating to the taking the decennial census

and to the apportionment of Representatives in the House of Representatives, in particular 13 U.S.C. §§ 1 *et seq.*, and 2 U.S.C. § 2a, require that an enumeration be made of all persons determined to be actually residing in the states, cities, and sub-units of the United States, so that the apportionment of Representatives among the several states and the apportionment of Congressional districts within each state can be made in strict compliance with the principle of equal representation for equal numbers of persons. Accordingly they impose an absolute duty on the defendants herein to allocate all persons determined by the Bureau to be actually residing in the United States among the states, cities and sub-units of the United States in which they can reasonably be determined to be actually residing. This absolute duty is not satisfied by allocating only those persons personally contacted and recorded by employees of the Bureau during the taking of the decennial census when the Bureau has determined that substantial numbers of other persons, not so personally contacted and recorded, actually reside in the United States.

(b) Alternatively, even if Art. I, § 2, cl. 3, and the aforementioned laws of the United States did not impose an absolute duty on the defendants herein to allocate all persons determined to be actually residing in the United States among the states, cities and sub-units of the United States, they require at a minimum that the actual enumeration of the population of the states, cities and sub-units of the United States be the most accurate actual enumeration that it is reasonably possible to make,

and an actual enumeration, with the undercount included and allocated to the states, cities and sub-units of the United States, is a more accurate enumeration of the actual population of the states, cities and sub-units of the United States, is a more accurate enumeration of the actual population of the states, cities and sub-units of the United States at the time of the taking of the decennial census than an enumeration in which the undercount is not included and allocated among the states, cities and sub-units of the United States.

(c) Alternatively, even if Art. I, § 2, cl. 3, and the aforementioned laws of the United States did not impose the duty set forth in subparagraph (a) of this paragraph or the duty set forth alternatively in subparagraph (b) of this paragraph, in light of the fact that demographic and statistical techniques are available by which the undercount can be allocated among the states, cities, and sub-units of the United States, and in light of the fact that an enumeration in which such allocation is made is a more accurate enumeration of the actual population of the states, cities, and sub-units of the United States at the time of the taking of the decennial census than an enumeration without such allocation, the refusal of the defendants to include and allocate the undercount among the states, cities and sub-units of the United States is arbitrary, capricious and lacking in rational justification. This being so, the refusal of the defendants to include and allocate the undercount among the states, cities and sub-units of the United States is violative of Art. I, § 2, cl. 3, and the aforementioned laws of the United States, and further deprives the plaintiffs of important liberty

and property interests without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(d) The failure to include and allocate the undercount among the cities and sub-units of the United States has the effect of debasing the representation and the vote of persons residing and registered to vote in the City of Detroit, which is disproportionately undercounted in relation to virtually every other city and sub-unit in the State of Michigan, in violation of Art. I, § 2, cl. 3, with respect to representation in and the election of Members of the House of Representatives of the United States, and in violation of the Fifth Amendment's Due Process Clause, with respect to representation in and the election of Members of the Michigan Senate and House of Representatives.

(e) Since the entitlement of the City of Detroit to federal grants-in-aid under numerous federal programs and to the allocation of certain funds by the State of Michigan depends on the official population count of the City of Detroit, as prepared and certified by the Bureau, the arbitrary, capricious and irrational refusal of the defendants to include and allocate the undercount to the City of Detroit deprives the City of federally and state-established property rights without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

31. The illegal and unconstitutional actions of the defendants, as set forth herein, have caused, and unless restrained by this Court, will continue to cause, the following injuries, among others, to the plaintiffs:

(a) Plaintiff, Coleman A. Young, as a resident and registered voter of the City of Detroit, like all other residents and registered voters of the City of

Detroit, has been deprived and will continue to be deprived of his right to equal representation in the House of Representatives of the United States, and of his right to have his vote for Members of the House of Representatives weighted equally, in relation to the representation and weight of vote of other residents and registered voters of the State of Michigan who reside outside of the City of Detroit;

(b) Plaintiff, City of Detroit, will be deprived of its full and fair representation in the House of Representatives of the United States, in that, as a result of the refusal of the defendants to allocate appropriately the census undercount among the City of Detroit and other cities and sub-units in the State of Michigan, in the reapportionment of Congressional districts within the State of Michigan following the 1980 decennial census, fewer Congressional districts will embrace part of the City of Detroit than likely would be the case if the census undercount were allocated appropriately among the City of Detroit and other cities and sub-units in the State of Michigan;

(c) Plaintiff, City of Detroit, has been deprived and will continue to be deprived of substantial amounts of federal funds that are distributed proportionately to cities and other sub-units of the United States on the basis, in whole or in part, of the population of said cities and sub-units, as contained in the official population count, prepared and certified by the Bureau, than would be the case if the census undercount were allocated appropriately among the City of Detroit and the other cities and sub-units of the United States.

(d) Plaintiff, Coleman A. Young, as a resident and registered voter of the City of Detroit, like all other residents and registered voters of the City of Detroit, will be deprived of his right to equal representation in the Michigan Senate and House of Representatives, and of his right to have his vote weighted equally, in relation to the representation and weight of vote of other residents and registered voters of the State of Michigan who reside outside of the City of Detroit;

(e) Plaintiff, City of Detroit, will be deprived of its full and fair representation in the Michigan Senate and House of Representatives, in that, as a result of the refusal of the defendants to allocate appropriately the census undercount among the City of Detroit and the other cities and sub-units in the State of Michigan, in the reapportionment of state senatorial and legislative districts following the 1980 decennial census, fewer state senatorial and legislative districts will embrace part of the City of Detroit than likely would be the case if the census undercount were allocated appropriately among the City of Detroit and other cities and sub-units in the State of Michigan;

(f) Plaintiff, City of Detroit, has been deprived and will continue to be deprived of substantial amounts of state funds that are distributed proportionately to cities and other sub-units within the State of Michigan on the basis, in whole or in part, of the population of said cities and sub-units, as contained in the official population count, prepared and certified by the Bureau, than would be the case if the census undercount were allocated appro-

priately among the City of Detroit and the other cities and sub-units in the State of Michigan.

32. As a result of the illegal and unconstitutional actions set forth herein, the plaintiffs have suffered, and unless such actions are restrained by this Court, will continue to suffer, great, immediate and irreparable injury, in violation of rights guaranteed to them and obligations imposed upon the defendants by the Constitution and laws of the United States. The plaintiffs have no plain, speedy and adequate remedy at law, and the present suit is the only means of securing the relief requested.

WHEREFORE, plaintiffs respectfully pray for the following relief:

1. That this Court advance this matter on its docket, order a speedy hearing at the earlierst practicable date and cause this case to be in every way expedited, so that any relief ordered by this Court in favor of the plaintiffs herein can be implemented in advance of the time that the defendant Barabba reports the total population of the United States by states to the defendant Klutznick, and in advance of the time that the defendants prepare and certify the official count of the population of the cities and sub-units of the United States.

2. That a declaratory judgment be issued to the effect that:

(a) The Constitution and laws of the United States require the defendants to make an allocation of the actual population of the United States, as determined by the Bureau, including all those persons not personally contacted or recorded by employees of the Bureau during the taking of the 1980 decennial census, among the respective states,

cities and sub-units of the United States, in a manner reasonably calculated to make the official population count of each state, city and sub-unit of the United States correspond as nearly as is practicable to the actual population of each city, state and sub-unit of the United States;

(b) The Constitution and laws of the United States require that the tabulation of the total population by states, to be reported to the President by the defendant Klutznick, pursuant to 13 U.S.C. § 141, be a tabulation of the actual population by states, as determined by the Bureau, including all those persons not personally contacted or recorded by employees of the bureau during the taking of the 1980 decennial census, and that such persons be allocated among the several states in a manner reasonably calculated to make the official population count of each state correspond as nearly as is practicable to the actual population of each state;

(c) The Constitution and laws of the United States require that the statement submitted by the President to the Congress, pursuant to 2 U.S.C. § 2a, showing the whole number of persons in each state, as ascertained under the decennial census of the population, and the number of Representatives to which each state would be entitled by law, be a statement of the actual population of each state, as determined by the Bureau, including all those persons not personally contacted or recorded by employees of the Bureau during the taking of the 1980 decennial census, and that such persons be allocated among the several states in a manner reasonably calculated to make the official population count of each state correspond as nearly as is

practicable to the actual population of each state; and further that the statement showing the number of Representatives to which each state would be entitled by law be based on the actual population of each state, ascertained as aforesaid;

(d) The Constitution and laws of the United States require that the official population count of cities and sub-units of the United States, as prepared and certified by the Bureau, be a count of the actual population of each city and sub-unit of the United States, as determined by the Bureau, including all those persons not personally contacted or recorded by employees of the Bureau during the taking of the 1980 decennial census, and that such persons be allocated among the cities and sub-units of the United States in a manner reasonably calculated to make the official population count of each city and sub-unit correspond as nearly as is practicable to the actual population of each city and sub-unit.

3. That a permanent injunction issue against the defendants and their successors in office, directing the defendants and their successors in office to perform the following actions required of them by the Constitution and laws of the United States:

(a) In the taking of the 1980 decennial census and in the taking of every decennial census thereafter, to make an allocation of the actual population of the United States, as determined by the Bureau, including all those persons not personally contacted and recorded by employees of the Bureau during the taking of the decennial census, among the states, cities and sub-units of the United States in a manner reasonably calculated to make the official population count of each state, city and sub-unit of

the United States correspond as nearly as practicable to the actual population of each state, city and sub-unit of the United States:

(b) To enumerate the official population count of each of the several states, as such population has been determined in the manner specified in sub-paragraph (a) of this paragraph, and in no other manner;

(c) To prepare and certify the official population count of each city and sub-unit of the United States, as such population has been determined in the manner specified in sub-paragraph (a) of this paragraph, and in no other manner;

(d) In the taking of the mid-year census, pursuant to 13 U.S.C. § 141, and in the collection of any other general population data, as required or authorized by law, to make an allocation of the determined actual population of the United States to each state, city and sub-unit of the United States in the manner specified in sub-paragraph (a) of this paragraph, and in no other manner, and to so certify the official population count of every state, city and sub-unit of the United States.

4. That pending the final disposition of this case, an interlocutory injunction issue against the defendants and their successors in office, if any, directing that they take all actions that are necessary to prepare an enumeration of the actual population of the United States, as determined by the Bureau, that include an allocation of all those persons not personally contacted and recorded by the employees of the Bureau during the taking of the 1980 decennial census, among the states, cities and sub-units of the United States. Said allocation is to be

accomplished in a manner reasonably calculated to make the official population count of each state, city and sub-unit correspond as nearly as is practicable to the actual population of each state, city and sub-unit.

5. That this Court enter and award such other relief to which the plaintiffs, or either of the [*sic*], may appear to be entitled.

Respectfully submitted,

/s/ COLEMAN A. YOUNG
MAYOR OF THE CITY OF DETROIT

AFFIDAVIT

State of Michigan
County of Wayne—ss.

COLEMAN A. YOUNG, being first duly sworn, deposes and says that he is the Mayor of the City of Detroit, Michigan, that he has read the foregoing Complaint and that the same is true of his own knowledge, except as to those matters stated therein to be upon information and belief, and as to those matters, he believes them to be true.

/s/ COLEMAN A. YOUNG

Subscribed and sworn to before me
this 1st day of April, 1980.
/s/ Bernice Elizabeth Carter
Notary Public, Wayne County, Michigan
My Commission expires: Feb. 1, 1981

Respectfully submitted,

HONORABLE GEORGE W. CROCKETT, JR.
Acting Corporation Counsel for the City of Detroit
/s/ GEORGE W. CROCKETT, JR. (P12344)

Special Counsels for the City of Detroit:

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/s/ ERNEST GOODMAN (P14160)
/s/ JAMES A. TUCK (P21603)
/s/ ROBERT A. SEDLER (P31003)
Wayne State University School of Law
Detroit, Michigan 48202
Telephone: 577-3968

Dated:

AMENDMENT TO COMPLAINT

United States District Court
Eastern District of Michigan
Southern Division

(Filed June 18, 1980)
No. 80-71330

Coleman A. Young, et al., Plaintiffs vs. Philip M. Klutznick, et al., Defendants

Pursuant to FRCP 15(a), the plaintiffs hereby amend their complaint in the above-titled action as a matter of course, prior to the time that the defendants have served on the plaintiffs their answer to said complaint. The complaint is amended by adding a new sub-paragraph, designated as sub-paragraph (e), to paragraph 3 of the

prayer for relief. Paragraph 3 of the prayer for relief, as amended, now reads as follows:

> 3. That a permanent injunction issue against the defendants and their successors in office, directing the defendants and their successors in office to perform the following actions required by them by the Constitution and laws of the United States:
>
> (a) In the taking of the 1980 decennial census and in the taking of every decennial census thereafter, to make an allocation of the actual population of the United States, as determined by the Bureau, including all those persons not personally contacted and recorded by employees of the Bureau during the taking of the decennial census, among the states, cities and sub-units of the United States, in a manner reasonably calculated to make the official population count of each state, city and sub-unit of the United States, correspond as nearly as practicable to the actual population of each state, city and sub-unit of the United States. . . .
>
> (e) *To refrain from certifying the official population count of the United States, or of the states, cities and sub-units of the United States, or from publishing in any manner what purports to be an official or unofficial population count of the United States, or of the states, cities and sub-units of the United States, except as the population that is the basis of such population count has been determined in the manner*

specified in sub-paragraph (a) of this paragraph, and in no other manner."

Respectfully submitted,

GEORGE W. CROCKETT, JR.
Acting Corporation Counsel
for the City of Detroit

Special Counsels for the City of Detroit:

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By: /s/ ROBERT A. SEDLER (P-31003)
Attorneys for Plaintiffs

DATED: June 18, 1980

FINAL PRE-TRIAL ORDER

United States District Court
Eastern District of Michigan
Southern Division

(Filed Aug. 18, 1980
No. 80-71330

Coleman A. Young, Ind., et al., Plaintiffs, v. Philip M. Klutznick, et al., Defendants.

At a session of said court held in the Federal Building in the City of Detroit, Wayne County, Michigan on ————————.

PRESENT: Hon. Horace Gilmore, Federal Judge.

I. *STATEMENT OF CLAIMS OF PLAINTIFFS*

There has been in the decennial censuses performed by the U.S. Census Bureau over the last several decades a repetitive pattern of persons not being counted in the census-taking process. This undercount occurs at a rate four (4) times greater in black communities than it does in white communities. As a result, those states and/or those cities or geographical areas having a significant percentage of black residents are denied an equal right of representation and vote. Since the undercount rates are greater in minority and black neighborhoods, citizens living in those neighborhoods are denied equal representation under the Supreme Court requirements of one person, one vote rules that have been set down by the U.S. Supreme Court.

It is Plaintiffs' contention that there are scientifically acceptable procedures for identifying the level of the undercount in the United States and for correcting raw

census population figures by scientific and statistical means in order to establish population figures for the states, cities and sub-units thereof that more fairly, more accurately and more equitably represent the true, actual population of those states or areas than is reflected in the raw census figures which have historically been prepared by the Census Bureau for the apportionment of representatives and preparation of congressional districts.

It is Plaintiffs' claim that under one of several constitutional theories advanced by the Plaintiffs, the Census Bureau should be ordered to make adjustments to the 1980 decennial census figures. In addition, it is Plaintiffs' claim that the Census Bureau should be enjoined from issuing any census figures to the President of the United States on January 1, 1981, and to the President of the United States, Congress and/or the States before April 1, 1981, unless and until those population figures are adjusted for the undercount.

Plaintiffs contend that this adjustment is constitutionally required for any one of three grounds:

(1) That Article One, Section Two, Clause three requires an "actual enumeration of whole numbers of persons" residing in the United States and that this constitutional end can only be achieved by requiring the Census Bureau to adjust their raw population data by the known undercount in order to obtain an equitable and truer actual population count.

(2) Since blacks are undercounted at a rate four (4) times greater than whites (In 1970, blacks were undercounted at 7.7% and whites by 1.9%.), the ultimate effect is to dilute the voting power of the black population in the United States. This is specifically and

directly prohibited by Section Two of the Fourteenth Amendment which guarantees that the voting power of each black citizen of the United States be given equal weight to each white citizen of the United States. Since the U.S. Bureau of Census decennial census figures that have been historically published disproportionately dilute the total population of blacks in the country far in excess of the dilution of the white voting power in this country, there is a constitutional injustice to black residents of the United States which is expressly prohibited by the Fourteenth Amendment of the Constitution, Article I, Section Two. In order to obtain relief from that constitutional injury, it is constitutionally required that the --------- order the Census Bureau to adjust their raw census population figures so that the weight of vote of black residents of the United States equals that of white residents of the United States.

II. *STATEMENT OF DEFENDANTS' CLAIMS*

A. *Adjustment Of The Census Data For Purposes Of Apportionment Of The United States House Of Representatives Is Neither Authorized Nor Permitted By The Constitution Or The Census Act.*

1. The taking of a decennial census of persons residing in the United States is required by Article I, Section 2, Clause 3 of the Constitution and the only mandated use of census data derived therefrom is apportionment of members of the United States House of Representatives among the several States. For this purpose, the Constitution mandates the population figure used for apportionment be an "actual Enumeration." Indeed, since the first census was taken in

1790, the census has consisted of a straightforward headcount, as accurate as is reasonably possible, of all persons residing in the United States. Inherent in this constitutionally mandated process is the fact that, for various reasons, some residents are not enumerated. These persons form the census "undercount." While the existence of an undercount is acknowledged, its size and characteristics (*i.e.*, age, sex, race, ethnic origin) are not subject to absolute factual verification and can only be estimated. Thus, statistical adjustment of the census data is not constitutionally authorized or permitted for purposes of apportionment since the resulting figure would be the product of an unverifiable estimate rather than an "actual Enumeration."

2. Moreover, the constitutional principle that each vote must be weighted with exactitude in the apportionment of the House of Representatives — *i.e.*, the one-man one vote principle — does not require that an adjustment be made in the census data for purposes of apportionment since:

(a) The apportionment of seats among the States is based on the "method of equal proportions," 2 U.S.C. Section 2a, with each State being constitutionally guaranteed at least one seat. Accordingly, of the 435 Representatives, 385 are apportioned among the States based on the States' respective populations. This process requires a division based on approximations: It means that two States with roughly equal populations may not receive the same number of Representatives. Further, it means that a small State, *e.g.* Nevada, is given one Representative despite the fact that its population may be greater or less than other one-district States, or even more telling, that the population of its single district is greater or less than that of districts in multi-district

States. Hence, the weight afforded to the vote in such districts can neither be said to be equal or unconstitutionally unequal.

(b) Apportionment is based on the entire enumerated population of the States and includes many persons who do not or cannot vote: *e.g.*, felons, minors, illegal aliens. Thus, the weight afforded to a vote is an inapt [*sic*] yardstick for the constitutional measurement of whether an adjustment should be done.

3. Assuming *arguendo* that Article I does not prohibit the use of adjusted data in apportioning the House of Representatives, it is clear that it does not specifically require the use of such data. Rather, Article I textually commits to the Congress the plenary authority to determine the method and manner in which each decennial census will be committed: "(t)he actual enumeration shall be made within three years after the first Meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." Through enactment of the Census Act, 13 U.S.C., Section 2 *et seq.*, the Congress has exercised that plenary authority in a manner which precludes the use of adjusted data for purposes of apportionment. Specifically, Congress has provided that:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this Title. (13 U.S.C. Section 195)

4. However, assuming *arguendo* that Congress in enacting the Census Act, particularly 13 U.S.C. Section

195, has not specifically prohibited the use of adjusted data for apportionment purposes, neither has it required that an adjusted figure be used for such a purpose. Rather, the Congress has specifically entrusted the means of arriving at the Census report to the discretion and expertise of the Secretary of Commerce and hence, the Bureau of the Census. As a result of the exercise of that expertise, the Census Bureau has determined that no adjustment for purposes of apportionment should or, in any event, could be made by the relevant statutory dates: *i.e.*, December 31, 1980 for transmission of the Nationwide and State Census results to the President and April 1, 1980 for transmission of sub-State totals to the States. That decision is neither arbitrary, capricious nor an abuse of discretion.

B. *Adjustment Of The Census Results Cannot Be Done In A Statistically Defensible Manner By The Relevant Statutory Time Deadlines And Would Not Produce A Population Figure Closer To The Truth Than The Unadjusted Census Results.*

1. The point of departure for a factual determination of whether an adjustment in the census data could or should be made is the ascertainment of the size and characteristics of the undercount itself, *e.g.*, how many persons were not enumerated and their race/age/sex composition. This information cannot be established by December 31, 1980 at the national and state level (for purposes of apportionment of seats between the States or by April 1, 1981 at the sub-national level for purposes of apportionment of seats within the State). Due to improvements in the coverage of the 1980 census, the undercount rates of previous censuses provide no defensible analog to the present undercount and thus

precludes the application of undercount estimates in previous censuses.

Assuming, however, that a rough estimation of the factors set forth above is established by the relevant dates, it is also necessary, for purposes of adjustment, to ascertain the undercount rate based on ethnicity as well as race. The reason for this is simply stated: ethnic groups such as Hispanics or Native Americans may be undercounted at rates different than that of whites or, for that matter, blacks and must be specifically included in the adjustment process. However, there is no statistically reliable or factually defensible basis to presently assume or ascertain the size of the Hispanic undercount. That factor can be ascertained only after such study — and not before the relevant true deadlines.

3. Further assuming that through some statistical or demographic manipulation the size and characteristics of the undercount at the national level can be ascertained by December 31, 1980 and, hence, the national population figures could be adjusted to include the undercount, the present state of knowledge and of the statistical demographic art would not allow defensible adjustment to be made on the State level by the time deadline. Indeed, the expertise necessary to make an adjustment at that level is on the frontier of knowledge. Adjustment at that level, however, could only affect the number of Representatives each state would receive through apportionment. The actual districting of these seats within the States would thus depend on adjustment at the sub-State level, *e.g.*, municipalities, countries [*sic*], city blocks or tracts. The present state of demographic/statistical knowledge for adjustment at that level, however, is non-existent in terms of adjusting in a statistically defensible manner so that such sub-State

unit would be accurately and fairly adjusted, *i.e.*, that the adjusted population would be closer to the actual population than is the unadjusted population figure. If exactitude of size in the inter-State districting process is constitutionally required, it can thus not be done on the basis of census data at the local level adjusted on the basis of present knowledge.

4. A determination of whether an adjustment can be made which would make the adjusted figure closer to the truth than the unadjusted can occur, if at all, only after the Census Bureau has had the opportunity to fully tabulate the persons enumerated and to determine their characteristics, *i.e.*, age, race, sex. That tabulation can be completed no earlier than mid-December, 1980, and a determination of characteristics, excluding ethnic origin, can be reached no earlier than third quarter, 1981. A determination as to either the size or undercount of the Hispanic population will take even longer to ascertain. Thus, no statistically defensible adjustment can be performed by the relevant statutory deadlines or at all which would cause the adjusted figure to be closer to truth at a sub-national level than the unadjusted count. Judgment must, therefore, be entered for defendants.

III. *STIPULATION OF FACTS*

The parties hereby stipulate the following facts are true:

A. In the taking of the 1980 decennial census, there will be a census undercount, in that all of the persons actually residing in the United States on the census date, April 1, 1980, will not be enumerated as part of the 1980 decennial census.

B. In the taking of the 1980 decennial census, it is likely that there will be a differential of completeness for blacks and Hispanics when compared to whites.

IV. *ISSUES OF FACT*

A. *Plaintiffs' Statement of Issues of Fact*

(1) All of those facts raised by Plaintiffs' claim that are disputed.

(2) Whether or not reasonable mathematical, statistical and scientific techniques are available to adjust the decennial census population figures in order to produce population totals that are closer to the truth than unadjusted population totals for purposes of apportionment and congressional districting.

(3) Relief compelling the Census Bureau to adjust the 1980 decennial census figures by January 1, 1981, and April 1, 1981, for reporting to the President and to the States.

(4) Injunctive relief preventing the Census Bureau from reporting unadjusted numbers to the President or to the States on January 1, 1981, and April 1, 1981.

(5) All those combined questions of law and fact raised in the pleadings in this matter.

B. *Defendants' Statement of Supplemental Issues of Fact*

(6) Whether a statistically defensible adjustment for the undercount which would produce a number closer to the "actual" population than the unadjusted data can be made (1) for the national and State level by December 31, 1980 or at all, and (2) for the sub-State level by April 1, 1981 or at all.

V. *ISSUES OF LAW*

A. *Plaintiffs' Statement of Issues of Law*

(1) Whether there is a constitutional injury because of the disparate black undercount in violation of Section Two of the Fourteenth Amendment.

(2) Relief compelling the Census Bureau to adjust the 1980 decennial census figures by January 1, 1981, and April 1, 1981 for reporting to the President and to the States.

(3) Injunctive relief preventing the Census Bureau from reporting unadjusted numbers to the President or to the States on January 1, 1981, and April 1, 1981.

(4) All those combined questions of law and fact raised in the pleadings in this matter.

B. *Defendants' Statement of Supplemental Issues of Law*

(5) Whether plaintiffs can establish to a preponderance of the evidence through the presentation of clear, cogent and convincing evidence that an adjustment for the undercount at the national, State, and sub-State levels, respectively, (1) could be made in a statistically defensible manner by the relevant statutory deadlines or at all, and (2) would produce a number closer to "actual" estimated population than an unadjusted count.

VI. *WITNESSES*

A. *Plaintiffs' List of Witnesses*

1. Personnel of the Bureau of Census

Vincent Barabba	Daniel Levine
Leo Estrada	George Hall
Peter Bounpane	Meyer Zitter
Charles Jones	David Bateman
Charles Cowan	Susan Miskura
Rex Pullin	Richard Bart
Jacob Siegel	Donald Starsinic
Dr. Barbara Bailar	Robert G. McWilliam
Jennifer Peck	Gary Post
Stan Matchett	Morris Gorinson
Eli Marks	

All persons from the Bureau of Census listed in Defendants' Answers to Interrogatories and/or whose names are reflected in the attachments to Defendants' Interrogatories:

2. *Personnel of the City of Detroit*

Plaintiff Coleman A. Young

Arletta Douglas	Lester Jones
Patti Becker	Ron Gracia
Charles Ohno	

3. *Personnel of the U.S. Conference of Mayors*

Honorable Maynard Jackson

Mel Mister	John H. Ashley
Robert Hill	Philip M. Hauser
Karl Taeuber	Robert Strauss
George Hurstic	Nathan Keyfitz

B. *Designation of Defendants' Witnesses*

The following persons may be called by Defendants as witnesses at trial:

1. Vincent Barabba
   Director, Bureau of the Census
   Washington, D.C.

2. Daniel Levine
   Deputy Director, Bureau of the Census
   Washington, D.C.

3. Barbara Bailar
   Bureau of the Census
   Washington, D.C.

4. Jacob Siegel
   Bureau of the Census
   Washington, D.C.

5. George Hall
   Bureau of the Census
   Washington, D.C.

6. Peter Bounpane
   Bureau of the Census
   Washington, D.C.

7. Meyer Zitter
   Bureau of the Census
   Washington, D.C.

8. David Bateman
   Bureau of the Census
   Washington, D.C.

9. Dr. William Kruskal (By deposition)
   Dean of Department of Social Sciences
   University of Chicago
   Chicago, Illinois

10. Leobardo [*sic*] F. Estrada (By deposition or live testimony)
Bureau of the Census
Washington, D.C.

Defendants reserve the right to call witnesses, in addition to those noted above, as rebuttal witnesses.

VII. *EXHIBITS*

A. *List Of Exhibits To Be Offered By Plaintiffs*

Plaintiffs reserve the right to offer any of the documents provided to Plaintiffs in response to discovery in this case. For a compilation of these exhibits, see attachments A, B, C and D, all deposition exhibits, all Task Force memorandums, all hearings and publications in the House Post Office and Civil Service Subcommittee on Census and Population and Census and Statistics including, but not limited to, Serial Numbers 91-30, 91-34, 92-16, 92-15, 93-7, 93-4, 93-19, 93-29, 93-39, 93-44, 93-45, 93-52, 93-49, 94-8, 94-14, 94-36, 94-24, 94-35, 94-38, 94-84, 94-47, 94-65, 94-50, 94-83, 94-91, 94-80, 94-76, 94-89, 95-13, 95-42, 95-39, 95-40, 95-41, 95-42, 95-38, 95-46, 95-66, 96-12, 96-13, 96-25, 96-14, 96-15, 96-16, 96-17, 96-18, 96-19, oversight hearings in Baltimore, Maryland, 96-44, 96-55, oversight hearings in Puerto Rico, Chicago and Detroit, and all oversight hearings.

Report on the 1980 Decennial Census prepareed by the Sub-committee on Census and Population of the Committee on Post Office and Civil Service Committee print #96-13, dated May 23, 1980.

Exhibits prepared by Karl Taueber entitled "Distribution and Concentration of the Black Population"

and "The Black Population of the City of Detroit in 1970."

"Census in 1980: Continuing the Fact Finder Tradition"

"Complete Procedural History," 1970 Census of Population and Housing, PHC (R-1A through 1H) and PHC (R-2,3 and 4)

All 1970 Census of Population and Housing, "Evaluation and Research Program Reports" identified as PHC (E-1 through 13)

Technical Paper #4

Technical Paper #29

All "Evaluation and Research Programs" of the U.S. Census of Population and Housing, 1960 Series ER-60, #1 *et seq.*

America's Uncounted People, report of the Advisory Committee on Problems of Census Enumeration, National Research Council, National Academy of Sciences, 1972.

"Counting of the People in 1980: An Appraisal of Census Plans," National Research Council, National Academy of Sciences, 1978.

"Revolution in U.S. Government Statistics, 1926-1976"

"1970 Census User's Guide: Part 1 and Part 2"

"1980 Census User's Guide: Part 1 and Part 2"

Current Population Reports, "Population Estimates and Projections", Series P25, #721, 802 and 870; P25, #461 and 517; P26, #49-93; P25, #527, 530-532, 535, 620,

709, 739, 810 and 873; P26, #78-1 through 78-50; P25, #727 and 814; and P26, #21

Curriculum Vitae and Bibliography of Philip M. Hauser

Curriculum Vitae and Bibliography of Nathan Keyfitz

Curriculum Vitae and Bibliography of Robert Hill

Curriculum Vitae and Bibliography of Robert Strauss

Curriculum Vitae and Bibliography of Karl Taeuber

"Estimating the 1970 Undercount for States and Local Areas" by Robert Hill dated July 23, 1973, Urban League Data Service

Copy of the February Workshop Paper prepared by Robert Hill and presented at that time

Materials prepared and published by Robert Strauss on the Revenue Sharing Act and on Census Undercount

Blow-ups of charts from various exhibits

All reports prepared by the Bureau of Census; pre-tests and dress rehearsals prepared for the 1980 decennial census.

"Census Information, Facts About the 1980 Census"

B. *Designation of Defendants' Exhibits*

Defendants join in all exhibits listed and designated by Plaintiffs which were produced by Defendants. Additionally, Defendants may offer the following exhibits into evidence:

1. Resume of Vincent Barabba
2. Resume of Daniel Levine

3. Resume of Barbara Bailar

4. Resume of Jacob Siegel

5. Resume of George Hall

6. Resume of Meyer Zittler

7. Resume of David Bateman

8. Resume of Dr. William Kruskal

9. Chart comparing adjustment methodologies

10. Chart of census coverage improvements

11. Market Opinion Research Summary Report (1980)

12. Conference on Census Undercount — proceedings of the 1980 Conference

13. *Counting the People in 1980*

14. *America's Undercounted People*

15. *Coverage of the Hispanic Population of the United States in the 1970 Census*

16. Deposition of William Kruskal

VIII. *ITEMIZED STATEMENT OF DAMAGES*

Non-Applicable

IX. *ESTIMATED LENGTH OF TRIAL*

Counsel estimate this non-jury trial to take ten days to two weeks.

X. *SETTLEMENT*

Counsel have agreed that there will be simultaneous submission of post-trial briefs by September 8, 1980 and/or sooner if ordered by the Court, and that such

party will have five days after submission of opposing party's brief to submit any reply that may be necessary.

HORACE GILMORE
FEDERAL JUDGE

Agreed as to form & content:
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William Elliott
Attorney for Defendants
U.S. Justice Department
Washington, D.C.

Acting Corporation Counsel
for the City of Detroit:
Hon. George W. Crockett, Jr.
Joe Baltimore
Detroit, Michigan 48202

Ms. Sheila Lieber
Attorney for Defendants
U.S. Justice Department
Washington, D.C.

JUDGMENT*

(United States Court of Appeals
For the Sixth Circuit)

(Young v Klutznick et al)

(Nos. 80-1751, 81-1027)

(Filed June 15, 1981)

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs taxed. Each party will bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: October 27, 1981

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* This judgment is printed out of order in the Appendix because its existence was not known to plaintiffs' counsel until it was served on counsel by the Clerk's Office under cover of October 27, 1981.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-867

In the Supreme Court of the United States

OCTOBER TERM, 1981

COLEMAN A. YOUNG, INDIVIDUALLY AND AS MAYOR, CITY OF DETROIT, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
DOUGLAS LETTER
Attorneys

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether petitioners lack standing to challenge the census tabulation of statewide population totals certified to the President under 13 U.S.C. 141(b) on December 31, 1980, for apportioning Representatives among the States, in view of the fact that petitioners have not alleged or shown that they will suffer any injury as a consequence of that apportionment.

2. Whether petitioners also lack standing to challenge the Census Bureau's method of determining sub-state population totals reported to the States under 13 U.S.C. 141(c) by April 1, 1981.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-867

COLEMAN A. YOUNG, INDIVIDUALLY AND AS MAYOR, CITY OF DETROIT, ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-55) is reported at 652 F.2d 617. The opinion of the district court granting an injunction (Pet. App. 76-119) is reported at 497 F. Supp. 1318. The opinion of the district court denying the motion to dismiss (Pet. App. 56-74) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1981 (Pet. App. 192). A petition for re-

hearing was denied on September 22, 1981 (Pet. App. 148). The petition for a writ of certiorari was filed on November 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Article I, Section 2, Clause 3, of the Constitution provides that Representatives shall be apportioned among the several States "according to their respective Numbers." Section 2 of the Fourteenth Amendment requires that the respective numbers include "the whole number of persons in each State, excluding the Indians not taxed." The Census Clause in Clause 3 of Article I, Section 2, states that the "actual Enumeration" of persons for purposes of the apportionment of Representatives shall be conducted every 10 years "in such Manner as [Congress] shall by Law direct."

Congress has, by law, directed the Secretary of Commerce, in the year 1980 and every 10 years thereafter, to "take a decennial census of population as of the first day of April of such year * * * in such form and content as he may determine." 13 U.S.C. 141(a). The Secretary must report to the President by December 31 of the census year the tabulation of total population by States as required for the apportionment of Representatives in Congress among the States. 13 U.S.C. 141(b). In addition, by April 1 of the year following the decennial census, the Secretary must furnish sub-state tabulations, for each State requesting such tabulations, to the officers or public bodies having responsibility for legislative apportionment or districting in that State. 13 U.S.C. 141(c).

Since its inception almost 200 years ago, the decennial census has been conducted essentially as a

"headcount" of individual inhabitants. The goal of the Bureau of the Census has been to identify as many persons as possible within the time and budget constraints that Congress has imposed (C.A. App. 32).[1] In 1980, the Census Bureau hired approximately 275,000 employees and utilized sophisticated tabulating equipment to count some 226 million people and more than 87 million housing units (*id.* at 652, 672).

It is inevitable, however, in an effort so massive and yet so concentrated, that some persons will not be counted. As this Court has observed, "[the census] figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate." *Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973). The difference between the tabulation resulting from the census enumeration and the true but inherently unknowable population of the Nation is commonly termed the "undercount." The undercount is not, of course, a new phenomenon; it has been a feature of every census, including the first, in which President Washington estimated that some 400,000 people were not counted (C.A. App. 655, 785).

Since 1950, the Census Bureau has attempted to estimate the national undercount by means of demographic analysis. This method encompasses a variety of approaches that involve a comparison of actual census counts with a set of expected totals developed through various demographic techniques (C.A. App. 394-395, 899). The demographic estimate of the true population of the Nation, for example, was based on the 1970 census total, adjusted for estimates of intervening changes in population drawn from independent sources, such as birth, death, and immigration

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[1] "C.A. App." refers to the four-volume joint appendix filed in the court of appeals.

statistics, as well as historical series of census data and sample surveys. Pet. App. 5 n.6; 45 Fed. Reg. 82874 (1980).[2] Using demographic analysis, the Bureau of the Census has estimated the undercount for the Nation as a whole in the three decennial censuses prior to 1980 to have been 3.3% in 1950, 2.7% in 1960, and 2.5% in 1970. Pet. App. 91; C.A. App. 401-402; see also *Carey* v. *Klutznick*, 508 F. Supp. 420, 426 (S.D.N.Y. 1980), rev'd and remanded on other grounds, 653 F.2d 732 (2d Cir. 1981), petition for cert. pending, No. 81-752.

The Census Bureau has been concerned about the undercount for years, and in 1980 the Bureau devoted substantial resources in an effort to minimize it (C.A. App. 661, 698, 700, 702-703, 761). Both the undercount and the Bureau's plans for reducing it were brought to the attention of Congress in the course of congressional oversight of the Bureau's preparation for the 1980 census (*id.* at 658, 699, 718),[3] and these

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[2] See also the October 27, 1980 Report submitted by the Census Bureau to the district court in this case. C.A. App. 120, 133-134.

[3] See *1980 Census: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 6-30 (1976); *1980 Census: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., 1st Sess. 76-82 (1977); *Pretest Census in Oakland, California and Camden, New Jersey: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., 1st Sess. (1977); *The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., 1st Sess. (1977); *Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess., *The Use of Population Data in*

measures were the subject of considerable discussion within the community of statistical and demographic experts (*id.* at 476, 492, 687). For example, the Bureau instituted a local review program, under which localities could examine totals for individual census enumeration districts and propose a reexamination where the local government's own data suggested that persons in the area had not been counted. Non-household checks also were instituted in urban areas, in which lists obtained from the Immigration and Naturalization Service and driver's license lists obtained from state authorities were matched against initial census returns. See *Carey* v. *Klutznick*, *supra*, 508 F. Supp. at 423.

In 1980, the undercount measured by the Census Bureau was zero. This does not mean that there was no *actual* undercount. The zero measured undercount reflects only that the demographic *estimate* of the Nation's population in 1980 was approximately equal to the number of persons the Bureau of the Census actually counted—226.5 million people. Pet. App. 9-10. This rough equivalence between the estimated population and actual count is thought to have resulted principally from the likelihood that whatever underenumeration of legal residents might have occurred was offset by the counting of illegal aliens, whose presence in the United States would not have been documented and therefore would not have been reflected in the demographic estimate of the 1980 population against

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Federal Assistance Programs (Comm. Print No. 95-16 1978); *The Census Undercount Problem: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 1, 3, 5 (1979); S. Exec. Rep. No. 96-13, 96th Cong., 1st Sess. 10-14 (1979). See also 13 U.S.C. 141(f).

which the census totals were compared. *Id.* at 9. Although the measured undercount is not in itself a reliable indicator of the accuracy of the 1980 census, because of the unknown number of illegal aliens who are thought to have offset much of the true undercount, the Census Bureau has concluded that the actual undercount was probably considerably smaller in 1980 than in prior years because of the improvement of procedures in the 1980 decennial census. *Ibid*; 45 Fed. Reg. 82873-82874 (1980).

b. Data compiled by the Census Bureau suggest that the undercount varies according to geographical setting, age, sex, income, immigration status, race, literacy, and living environment (C.A. App. 292, 343, 351, 417, 421, 480, 481, 623-624, 754, 837, 841, 856-857). Studies by the Bureau, while by no means definitive, also indicate that the rate differs from state to state, depending on the region of the country—a fact possibly explained by differences in climate, housing designs, distances between homes, census procedures, and regional attitudes toward government (*id.* at 807, 808, 837, 840, 842, 843, 856-857).

This case involves a challenge to the 1980 decennial census on the ground that the undercount varies according to race and national origin—specifically, that there is a disproportionate undercount of Blacks and Hispanics as compared with the rest of the population. The assertion is not that there was intentional discrimination against Blacks or Hispanics in the conduct of the census; no such allegation was made. Pet. App. 4. Rather, the contention is that a disproportionate undercount of Blacks and Hispanics results because of a variety of factors that, to a greater or lesser extent, contribute to making an accurate enumeration of minorities more difficult. These factors

are thought to include lower average income and resulting housing patterns of minorities, relatively less education, greater hostility to government, and larger proportions of minority individuals in the categories that are more difficult to enumerate, such as young males. *Id.* at 4 n.4, 92.

The Bureau of the Census has acknowledged that minorities have been disproportionately undercounted. For the 1950 census, for example, the Bureau estimated that the undercount was 2.5% for Whites, and 9.7% for nonwhites (including Blacks and others). In 1960 the rate was 2.0% for Whites and 8.0% for Blacks, and in 1970 the undercount was 1.9% for Whites and 7.7% for Blacks. Pet. App. 91; C.A. App. 401-402. However, as would be expected, the undercount rates for Blacks also varied by age, sex, income, and possibly by state as well; experimental Bureau data suggested, for example, that the Black undercount rate in Michigan itself in 1970 was measurably lower than the Black undercount rate nationally (*id.* at 798). Furthermore, because the rates appeared to vary by area, the difference between the undercount rate for Blacks and others was smaller in certain parts of the country, such as in the South (*id.* at 421, 480, 481). The Bureau also determined that in the past, the undercount rate for Hispanics as a general class might have exceeded the overall rate for Whites, but the Bureau has been unable to verify a specific Hispanic undercount rate for past years (*id.* at 295, 296, 297-298, 638, 639, 830, 831). In addition, the undercount rate for this broad category most likely varied among different Hispanic groups, such as those of Cuban, Mexican, or Puerto Rican origin (*id.* at 285-297).

In conducting the 1980 decennial census, the Bureau made substantial efforts to reduce the undercount of minorities. As the court of appeals observed, "all parties agree, including [petitioners] and their experts, that at great cost the Census Bureau, upon direction of the President and the Congress, has taken new and creative steps during the 1980 census to find and count disadvantaged groups" (Pet. App. 4). For example, the non-household checks in urban areas, utilizing driver's license and immigration lists (see page 5, *supra*), were designed in large measure to identify minorities. See *Carey* v. *Klutznick*, *supra*, 508 F. Supp. at 423. And as petitioners note (Pet. 3), the Bureau has concluded on the basis of comparisons with demographic estimates that the undercount of Blacks in the 1980 census was between 4.5 and 5.5%, a reduction of between 30 and 40% from the level of undercount of Blacks in the 1970 census. See Pet. App. 11.[4]

2.a. Petitioners Coleman Young, individually and as Mayor of Detroit, and the City of Detroit, as a municipal corporation, filed this action in the United States District Court for the Eastern District of Michigan on April 1, 1980, challenging the decennial census being conducted on that day. They alleged, on the basis of conclusions drawn from past censuses,

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[4] The Census Bureau has been able to make an estimate of the undercount of Blacks in 1980 on the hypothesis that the Black population contains relatively few illegal aliens and that the reliability of demographic analysis of the Black population therefore is not significantly affected by the illegal alien factor that renders unreliable the zero measured undercount rate for the population as a whole. J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population by Age, Sex, and Race in the 1980 Census: Preliminary Estimates by Demographic Analysis* 4 (Bureau of the Census, Nov. 1981).

that the 1980 decennial census would result in a disproportionate undercount of Black and Hispanic populations. They further alleged that because the City of Detroit has a higher percentage of Blacks and Hispanics than the rest of the State of Michigan, the disproportionate undercount would affect the apportionment between Detroit and the rest of the State of Michigan's Representatives in Congress and seats in the State Legislature, thereby diluting the right of petitioner Young to equal representation and an equal vote. Pet. App. 15, 57. They did not allege, however, that the disproportionate undercount deprived the State of Michigan as a whole of one or more Representatives that were apportioned to other States. Petitioners sought to compel an adjustment of census figures for the alleged undercount of Blacks and Hispanics. *Id.* at 57-58, 168-171.[5]

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[5] The standing of petitioner City of Detroit was premised on the contention that the allocation to the City of funds under a number of federal and state programs according to the City's population would be adversely affected by the alleged disproportionate undercount of Blacks and Hispanics in Detroit. Pet. 6 n.6; Pet. App. 152, 156, 161, 165, 166. As petitioners acknowledge (Pet. 6 n.6), neither the district court nor the court of appeals considered the standing of the City of Detroit to contest the census on this ground, and petitioners do not present the question of the City's standing to sue based on an alleged diminution in the amount of federal and state funds that will be allocated to the City. Indeed, petitioners do not present in their petition any question relating to the allocation of funds, federal or state (Pet. i, 11-23), and the court of appeals did not consider that issue. Funding questions therefore are not involved in the instant case.

In any event, petitioners have not alleged intentional discrimination against Blacks or Hispanics in the allocation of federal funds, which would be a necessary element of establishing a constitutional violation (*Washington* v. *Davis*, 426

Evidence was introduced at trial[6] explaining the numerous "coverage improvement" programs that were instituted by the Bureau to reduce the undercount (C.A. App. 329-330, 358-359, 466, 662-670, 707, 731-740, 760-765, 885). Experts for both sides agreed that until the actual 1980 results were available, the 1980 undercount and its features could not be known (Pet. App. 7; C.A. App. 332, 404-405, 478, 541, 638, 804, 830). Although the 1980 returns were not ready at the time of trial, preliminary indications at that time were that the improvement programs were succeeding because the Bureau was actually counting far more persons than it had anticipated (C.A. App. 666-667, 729, 734, 766-770).

At trial, the Bureau informed the district court that it had been directed by the Secretary of Commerce to investigate the feasibility of adjusting the 1980 census tabulations (C.A. App. 676-678, 991-992). Consequently, the Bureau had itself conducted a series of studies and conferences, but found that it would be unable to estimate the undercount rate with any confidence and could not in any event make adjustments before figures were required by statute to be furnished to the States in April 1981 (*id.* at 37-39, 676-679, 687, 872). The Bureau also described the

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U.S. 229 (1976)), for in the absence of such invidious discrimination, individual residents and their local governments plainly have no constitutional right to an equal share of funds expended by Congress in providing for the "general Welfare of the United States" (U.S. Const., Art. I, § 8, Cl. 1). The proper allocation of *state* funds is not a proper subject of a suit, as here, against federal officials.

[6] The district court earlier had denied the government's motion to dismiss the complaint for lack of standing and ripeness and failure to state a claim on which relief could be granted (Pet. App. 56-74).

programs it had planned in an attempt to measure the undercount, but it emphasized that these programs were experimental and that it did not know if they would produce usable data (Pet. App. 7-8; C.A. App. 271-273, 301, 361-367, 718, 728, 850, 857-867, 872).

b. Following the trial, in September 1980, the district court issued its opinion granting declaratory and injunctive relief in favor of petitioners (Pet. App. 76-119). The district court first held that petitioners had standing to challenge the 1980 census because it believed that the Constitution requires a State to use census figures for redistricting within its borders (*id.* at 85). The court also held that every person has a constitutional right to be counted in the decennial census (*id.* at 119, 121). As relief, the court enjoined respondents from certifying census figures to the President on December 31, 1980, and furnishing sub-state totals to the States by April 1, 1981, if those figures were not adjusted for the undercount. The court ordered respondents to adjust the figures at the national, state and sub-state level to reflect the differential undercount of Blacks and Hispanics and, apparently, the expected undercount of Whites as well. The court permitted the Bureau 30 days within which to submit a report describing a "statistically defensible" plan for complying with the required adjustment (*id.* at 101, 120-121).

c. Shortly thereafter, the government filed a motion for reconsideration along with its court-ordered report. The report, dated October 27, 1980, explained that in the two months since the trial, a large percentage of the 1980 preliminary field counts had become available (C.A. App. 122, 130). These counts

showed that the Bureau would tabulate some 226 million people, a figure equal to the Bureau's revised estimate of the population, leaving no "measured" undercount (*id.* at 131, 133). The Bureau then discussed the various available adjustment techniques in light of standards of statistical defensibility, and showed that each had significant problems (Pet. App. 9-10; C.A. App. 136-146). Hence, the Bureau concluded that the error rates and uncertainties in all of the adjustment methods would likely exceed the true net census error and that it would be unable to determine whether adjustments would actually result in more or less accurate figures (Pet. App. 9-10; C.A. App. 146-155).

In addition, the Bureau noted that even if it could determine accurate undercount rates at the national level, it could not accurately distribute that undercount among the States and subparts of States, as required by the district court's order (see Pet. App. 120-121). Although petitioners had contended that the Bureau could simply adjust by a nationally uniform rate, according to the percentage of Blacks and Hispanics in each State and sub-state area, the Bureau's October 27, 1980 report explained that this "synthetic method" would be based on the demonstrably false hypothesis that the undercount rates by race, age, and sex were uniform throughout the Nation (C.A. App. 148-149; see also Pet. App. 11-13). Indeed, the Bureau pointed out that one study of the 1970 census indicated that geographic differences accounted for greater variations than did race (C.A. App. 148). Therefore, the Bureau concluded that it knew of no statistically defensible adjustment methods (*id.* at 123, 133-139, 142-144, 145-146). Nevertheless, the district court denied the motion for reconsideration

and ordered the Bureau to develop a method of readjustment (Pet. App. 122-137).

d. On December 24, 1980, Justice Stewart granted respondents' request for a stay pending appeal of the district court's injunction (Pet. App. 147). On December 31, 1980, as required by the Census Act, the statewide census figures were reported to the President for purposes of apportionment of Representatives among the States. In addition, by April 1, 1981, all sub-state tabulations were furnished to the individual States.

4. The court of appeals reversed the judgment of the district court, concluding that petitioners did not have standing to challenge the census in reliance on its alleged impact on the drawing of congressional and state legislative districts within the State of Michigan. The court of appeals held that the States are not required by the Constitution to accept in all respects census tabulations supplied by the Bureau, but rather are free to make adjustments to these data (Pet. App. 16). Therefore, the court concluded that petitioners had no standing because they were asking the court to redress an injury caused not by respondents and the Bureau of the Census, which they direct, but by an independent third party, the Michigan Legislature (*id.* at 17-18). The court also concluded that the case was not ripe for review because the Michigan Legislature had not yet redrawn its congressional or state legislative districts. Thus, the court reasoned, the impairment of the vote petitioners asserted "may not occur at all, and cannot occur until the Michigan legislature acts" (Pet. App. 20).

Judge Keith dissented. He disagreed with the majority's holdings on standing and ripeness, but would have remanded the case to the district court for fur-

ther factual findings concerning the undercount in light of the data generated by the 1980 census (*id.* at 20-55).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals. Moreover, the record shows that the Bureau of the Census conducted the 1980 decennial census in a rational manner within the time and budget constraints established by Congress and in a manner that substantially reduced the undercount of Blacks. Review by this Court therefore is unnecessary.

1. As required by 13 U.S.C. 141(b), the Census Bureau certified to the President on December 31, 1980, the state-by-state totals of population based on the 1980 decennial census. Section 141(b) provides that these totals are reported for the purpose of the apportionment of Representatives among the several States, in conformity with the requirements of Article I, Section 2, Clause 3, of the Constitution. Petitioners have not contended that the State of Michigan is entitled to one or more Representatives in addition to the number apportioned to that State on the basis of the 1980 census (see Pet. App. 15, 60). Because petitioners do not claim any injury-in-fact resulting from the apportionment of Representatives among the States—or, therefore, any injury resulting from the December 31, 1980, report of the population of the several States, on which the apportionment was based—petitioners plainly have no standing to challenge the validity of the December 1980 figures. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*,

No. 80-327 (Jan. 12, 1982), slip op. 7; *Watt* v. *Energy Action Educational Foundation*, No. 80-1464 (Dec. 1, 1981), slip op. 9; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979).[7]

2.a. Petitioners argue, however, that the disproportionate undercount of Blacks and Hispanics will result in a disproportionate undercount of the City of Detroit as compared with the rest of the State, thereby affecting the apportionment of Representatives *within* the State of Michigan. This, petitioners argue (Pet. 11), will injure petitioner Young in his right to equal representation and equal weight of vote in the United States House of Representatives.[8] The short answer to this claim is that petitioners have sued the wrong parties to assert it.

Article I, Section 4, Clause 1, of the Constitution provides that "The Times, Places and Manner of holding Elections for * * * Representatives, shall be prescribed in each State by the Legislature thereof."

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[7] In contrast, the plaintiffs in the New York census case did contend that at least one additional Representative should have been apportioned to that State, and it was on this basis that the Second Circuit found that they had standing. *Carey* v. *Klutznick*, 637 F.2d 834, 838 (1980). The Second Circuit also held that the plaintiffs in that case had standing to challenge the loss of federal funds that they alleged would result from the undercount (*ibid.*), but the federal funding issue is not involved in this case. See note 5, *supra*.

[8] Petitioners apparently have abandoned their challenge to the 1980 census on the ground that the alleged disproportionate undercount in Detroit will affect the right of residents of Detroit to an equal apportionment of seats in the Michigan Legislature. They do not refer to this issue in the questions presented or argue it in the reasons for granting the petition. In its current posture, this case now is limited solely to the narrow context of intra-state congressional reapportionment.

That Clause further provides that "Congress may at any time by Law make or alter such Regulations." Congress could, under this authority, enact a law apportioning Representatives among congressional districts within the several States (*Wesberry* v. *Sanders*, 376 U.S. 1, 16 (1964)) or, presumably, assign this responsibility to an Executive official, such as the Secretary of Commerce or the Director of the Bureau of the Census. But Congress has not enacted such a law. The apportionment of Michigan's seats in the House of Representatives among the residents of that State therefore remains the responsibility of the Michigan Legislature, not the Secretary of Commerce or the Director of the Bureau of the Census. Accordingly, if the boundaries of congressional districts in Michigan are drawn in the future [9] in such a manner as to deprive petitioner Young or other citizens of Detroit of their constitutional rights, the responsibility for that action, too, will lie with the State of Michigan and its Legislature. It is, therefore, against the appropriate officials of the State of Michigan, not the Secretary of Commerce and the Director of the Bureau of the Census, that petitioner Young must bring suit to challenge an alleged impairment of his right to equal representation and an equal vote in the selection of Representatives. See Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 858-859 (1981).[10]

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[9] Congressional redistricting in Michigan as a result of the 1980 census has not yet taken place. See page 20, *infra*.

[10] Thus, for standing purposes, a challenge to congressional districting on the ground that the population data on which it was based are inaccurate is no different from any other challenge to districts drawn by a State legislature that allegedly

b. Petitioners nevertheless contend that, although the Michigan Legislature is responsible for the actual redrawing of congressional districts in the State, the Legislature will rely upon census data in doing so. Thus, the argument proceeds, because the alleged disproportionate undercount in Detroit will affect the apportionment of Representatives in Michigan, petitioners must be permitted to challenge the census results for Michigan. This reasoning is seriously flawed.

First, petitioners are wrong in contending (Pet. 17-19) that the Constitution *requires* the States to rely on census data for purposes of congressional districting within their borders. See *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 535 (1969); *id.* at 537 (Fortas, J., concurring); *Dixon* v. *Hassler*, 412 F. Supp. 1036, 1040 (W.D. Tenn.), aff'd *sub nom. Republican Party of Shelby County* v. *Dixon*, 429 U.S. 934 (1976); *Exon* v. *Tiemann*, 279 F. Supp. 603, 607-608 (D. Neb. 1967). Article I, Section 2, Clause 3, requires an apportionment of Representatives among the States "according to their respective Numbers," and the "actual Enumeration" is mandated by the succeeding sentence only in order to ascertain the respective total populations of the States. The Census Clause does not require that these totals be broken down by various sub-regions of a State to be used in laying out congressional districts; indeed, the Constitution does not even require that Representatives be elected from districts at all, rather than on an at-

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result in an impermissible population variance among them. Such suits traditionally have been brought against State officials, as in *Wesberry* v. *Sanders*, *supra*.

large basis. *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 8 & n.11.[11]

In addition, Article I, Section 4, Clause 1, strongly supports the conclusion that the States are not required by the Constitution to utilize census data for purposes of congressional redistricting, even if a breakdown of census data is furnished to each State by the federal government. Article I, Section 4, Clause 1, as we have noted, expressly leaves the "Times, Places and Manner" of electing Representatives to the States, absent overriding congressional regulation. Congress has not exercised its authority under this Clause to require the States to utilize census data. Section 141(c) of Title 13 merely provides that a State "may" submit a plan to the Secretary identifying the geographic areas within the State for which such population totals are desired.[12]

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[11] Petitioners incorrectly rely (Pet. 18-19) upon *Wesberry* v. *Sanders*, *supra*, in arguing that the States must use census data. The problem addressed in *Wesberry* involved what a State must do on the basis of population figures in hand; the problem here is the wholly separate question of how a State should first arrive at the figures on which apportionment is based. Moreover, in *Wesberry*, the Court focused principally on Article I, Section 2, Clause 1—providing that Representatives are to be chosen "by the People of the several States"—in holding that congressional districts within a State must be of equal size. 376 U.S. at 7-8, 17. The issue of a census was discussed only in passing. See, *e.g.*, 376 U.S. at 7 n.9, 13-14.

[12] For this reason, the authorization in Section 141 for the Secretary to furnish sub-state tabulations to the States plainly does not, as petitioners suggest (Pet. 18 n.14), indicate a congressional view that States are constitutionally required to use federally certified census figures for congressional redistricting.

Thus, if the Michigan Legislature is dissatisfied with the accuracy of the sub-state tabulations furnished it by the Census Bureau and believes that they should be adjusted for purposes of congressional redistricting within the State to compensate for an undercount, it may do so. Accordingly, if petitioner Young should suffer a dilution of his voting rights as a result of congressional districting based on data that reflect a disproportionate undercount of Blacks and Hispanics, that will be the result of independent action taken by the Michigan Legislature. As a result, petitioners do not have standing to challenge the census in Michigan because of its asserted effect on the right to vote for Representatives: "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); see also *Leeke* v. *Timmerman*, No. 80-2077 (Nov. 16, 1981); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617-618 (1973).[14]

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[14] Just as the Constitution does not require the Michigan Legislature to use the unadjusted census data furnished by the Census Bureau, the Constitution would not require the Michigan Legislature to use adjusted figures furnished by the Bureau. Thus, the relief sought by petitioners—adjustment of census figures—would not necessarily redress or prevent an injury to petitioner Young's right of equal representation and an equal vote for a United States Representative. This factor additionally explains why petitioners lack standing, for this Court has stressed that standing requires a showing that

c. Finally, we note petitioners' acknowledgement (Pet. 16 n.13) that the Michigan Legislature has not yet redrawn the congressional districts in the State in response to the 1980 census. Thus, the injury that petitioner Young asserts will result from the undercount of the City of Detroit—an impairment of his right to equal representation and an equal vote—has not occurred and indeed may not occur. We, therefore, agree with the court of appeals (Pet. App. 19-20) that this case is not ripe for resolution. Moreover, if, as petitioners predict, the Legislature draws congressional districts that impermissibly dilute the rights of the citizens of Detroit, petitioner Young would have a fully adequate remedy in a suit brought against the appropriate officials of the State of Michigan challenging the new reapportionment plan on the ground that the Legislature was required by the Constitution to adjust the data upon which it relied, whether these data were the tabulations furnished by the Census Bureau or figures obtained from some other source.

3. Petitioners also seek to present the question (Pet. 19-22) whether the 1980 census data must be adjusted for an undercount of Blacks and Hispanics. The court of appeals did not consider this issue, in view of its conclusion that petitioners lack standing to raise it. In any event, this contention is without merit.

As the court of appeals observed (Pet. App. 4), the Bureau of the Census devoted substantial attention and resources in connection with the 1980 census to the undercount problem generally and the dis-

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"if the relief sought is granted, the injury will be redressed." *Watt* v. *Energy Action Educational Foundation, supra,* slip op. 9; *Simon* v. *Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 39, 41.

proportionate undercount of Blacks and other minorities in particular. Indeed, petitioners "concede that the Census Bureau in 1980 made a conscientious effort to conduct an accurate head count of a diverse nation of approximately 225 million people using sound demographic methods developed over many years with the advice of leading scholars in many fields" (*ibid.*). The district court in *Carey* v. *Klutznick*, *supra*, similarly found the Bureau's overall methodology for conducting the census "reasonable," noting that the Bureau "developed several innovative procedures designed to improve coverage of the entire population such as the local review program and it planned procedures for enumerating the minority populations who from prior experience generally were differently undercounted." 508 F. Supp. at 430.

Moreover, although the Census Bureau's studies regarding the undercount of minorities are not and inherently cannot be definitive, the Bureau has estimated that the undercount of Blacks in 1980 was between 4.5 and 5.5%. Pet. App. 11. Petitioner does not contest the validity of this estimate. See Pet. 3. This suggests a reduction in the undercount rate for Blacks of between 30 and 40%, as compared with 1970, and represents a continuation of the trend since the 1950 census of reducing that undercount.

Finally, the Bureau concluded, after thorough consideration of the census data available to it in October and December 1980, that there was no statistically defensible method for adjusting for an undercount in the 1980 census. Pet. App. 9-12; C.A. App. 120-157; 45 Fed. Reg. 82874 (1980). The Bureau concluded, in short, that the available methods of adjustment all had serious flaws, and thus that after adjustment, neither the Bureau nor anyone else could be confident that the adjusted figures were any more

or less accurate than the results of the headcount (Pet. App. 11-13). This determination was entirely reasonable, and neither petitioners nor the district court have demonstrated that, in these circumstances, the Census Bureau's decision to certify and report the State and sub-state census tabulations without an adjustment was arbitrary or capricious. See *Carey* v. *Klutznick*, 637 F.2d 834, 838-839 (2d Cir. 1980).

In deference to the long-standing statistical expertise and independence of the Census Bureau, Congress has provided that the Secretary of Commerce shall conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a). Congress traditionally has exercised thorough oversight of the Bureau's elaborate planning for each decennial census. See note 3, *supra*. The courts are not authorized to substitute their judgment for that of the Secretary in these matters, as the district court did in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-867

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Petitioners,
v.
MALCOLM BALDRIDGE, Secretary of Commerce of the United States, and BRUCE CHAPMAN, Director, Bureau of the Census,
Respondents.

REPLY BRIEF OF PETITIONERS

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ARGUMENT

THIS COURT'S STANDING DECISIONS OF THIS TERM CLEARLY DEMONSTRATE THAT THE COURT OF APPEALS ERRED IN DENYING STANDING IN THE PRESENT CASE.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, No. 80-327 (Jan. 12, 1982), 50 Law Week 4103, this Court carefully delineated the nature of injury that must be suffered by the plaintiff in order to establish standing. As the Court stated,

"Although they [the plaintiffs] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs as a *consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by conduct with which one disagrees. This is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." 50 Law Week at 4109.

The dilution of a voter's weight of vote and right to equal representation, claimed by the petitioner in the present case, by contrast, is a direct and personal injury that has been recognized historically in *Baker* v. *Carr*, 369 U.S. 186 (1982), *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and their progeny, as being sufficient to confer standing. The holding and rationale of *Valley Forge* make it clear that the injury to the petitioner's weight of vote and right to equal representation caused by the Bureau's failure to adjust for the Black and Hispanic differential undercount constitutes *injury in fact* for standing purposes.

In *Watt* v. *Energy Action Educational Foundation*, No. 80-1464 (Dec. 1, 1981), 50 Law Week 4031, this Court held that the plaintiff had standing despite the *theoretical possibility* that the plaintiff would not benefit from the granting of the requested relief. There, the State of California, which received a share of the revenues derived from Outer Continental Shelf oil and gas leases, claimed that the Secretary of the Interior was required by statute to experiment with bidding systems that did not use the size of a cash bonus as the bidding variable. It was contended that California lacked standing because even if the Secretary were ordered to experiment with non-cash bonus bidding systems, he could exercise his

"legal discretion" to refuse to adopt such a bidding system, although it was proven by experiment to be superior to the cash bidding system. This Court rejected that contention, since it was *reasonable to assume* that, "after experimentation, the Secretary would use the most successful bidding system on all suitable OCS lease tracts, including those off the California coast." 50 Law Week at 4034.

Therefore, California had standing to challenge the Secretary's refusal to experiment with non-cash bonus bidding systems despite the *theoretical possibility* that the defendant would exercise his "legal discretion" not to use such bidding systems that would have afforded the plaintiff relief.

Likewise, in the present case, the *theoretical possibility* that the Michigan legislature could somehow make its own adjustment for the Black and Hispanic differential undercount to the Census Bureau's unadjusted official population count cannot be sufficient to deny standing to the plaintiff to challenge the constitutionality of the Bureau's refusal to adjust.

The "legal discretion" of the Secretary in *Watts* to refuse to use the most successful bidding system may be likened to the Court of Appeals' view of the "legal discretion" of the Michigan legislature to refuse to use the official population count of the decennial census as the population base for in-state Congressional redistricting. The "legal discretion" of the Secretary in *Watts* was irrelevant to the standing inquiry, since this court concluded that the Secretary probably would not exercise his "legal discretion" to refuse to use the most successful bidding system.

In the present case, the purported "legal discretion" of the Michigan legislature to refuse to use the official

population count of the decennial census (whether unadjusted or adjusted pursuant to the relief granted below) is equally irrelevant to the standing inquiry. The undisputed evidence in the court below firmly establishes that the Michigan legislature will in fact use the official population count of the 1980 decennial census, as certified and furnished by the Census Burea, as the *sole* basis for in-state Congressional redistricting, as it has done in every other decennial census.[1]

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[1] The suggestion by the respondents that the Michigan legislature has the disposition and scientific capabilities to adjust on its own for the Black and Hispanic differential undercount (Resp. Br. pp. 16, 19), not only finds no support whatsoever in the record of this case — and was never even suggested by the respondents at trial — but is internally inconsistent with the position that the respondent takes in regard to the capability of the Census Bureau to perform the necessary adjustment.

The respondents vigorously contend that it is impossible for even the Census Bureau to perform such an adjustment. They make this contention even though the Census Bureau has access to all of the data and statistical information that was obtained through the census-taking process, much of which they contend is privileged and not disclosable, even though the Bureau has the results of years of demographic statistics and research and even though it has a series of matching studies and statistical analysis which were designed into and made a part of the 1980 decennial census with the sole purpose of defining and quantifying the undercount of Black and Hispanics during the 1980 Census.

If the Bureau honestly contends that it is their judgment that with their vast resources, special expertise and first-hand access to census data that they feel that it would be difficult, if not impossible, for them to adjust, it seems inconceivable that they could turn around in their Brief and suggest to this Court that it is their considered judgment that the Michigan legislature has the ability and the scientific capabilities to reasonably and equitably adjust population totals.

The undisputed evidence at trial establishes that the *only* organization with the ability to adjust population totals to eliminate the undercount of Black and Hispanics in a "statistically defensible" manner is the United States Census Bureau. It also establishes that the Michigan legislature cannot and will not adjust for the Black and Hispanic differential undercount.

Therefore, if the Census Bureau were required to submit only an adjusted population count as the official population count of the 1980 decennial census, in the Congressional redistricting that followed, there would be no dilution of the petitioner's right to equal representation and equal weight of vote in the United States House of Representatives.

This Term's standing decisions, denying standing in *Valley Forge* and finding standing in *Watt*, make it clear that the standing doctrine promulgated by this Court does not countenance the invocation of abstract concepts such as "independent intervening actor" to deny standing where the granting of relief against the defendant who is before the court will admittedly, as in the present case, redress the claimed injury suffered by the plaintiff.

In *Watt*, the Court again emphasized in a unanimous decision that there are only two components to the injury in fact test of constitutional standing, not three, as the Court of Appeals in effect held in the present case. In regard to the second component, this Court made it clear that "cause" and "redressibility" are correlatives, not separate requirements. As it stated: "To demonstrate that it has standing, California must also show that there is a 'fairly traceable' causal connection between the injury it claims and the conduct it challenges, so that if the relief sought is granted, the injury will be redressed." 50 Law Week at 4033 (citations omitted).

In that case, it had to be assumed that if the relief were granted, the Secretary would use the most successful bidding systems on all leased tracts, including those off the California coast. Since there was a "substantial likelihood" that the granting of relief against the Secretary would redress the injury allegedly suffered by California, the refusal of the Secretary to experiment with non-cash bonus systems was the "cause" of the

injury claimed by California, and California had standing to challenge the legality of that refusal.

The present case is even stronger than *Watt* in regard to the redressibility of the claimed injury by the granting of relief against the defendant who is before the court. In the present case, it is an absolute certainty that if the Census Bureau is required to submit *only* an official population count that is adjusted for the Black and Hispanic differential undercount, there will be no injury in fact to the petitioner's right to equal representation and equal weight of vote in the United States House of Representatives. As stated previously, if only an adjusted official population count is submitted to the Michigan legislature, Congressional redistricting in Michigan will take place pursuant to that adjusted official population count. Therefore, the refusal of the Census Bureau to submit an adjusted population count is the "cause" of the petitioner's claimed injury for standing purposes, and the petitioner has standing to challenge the constitutionality of that refusal.

This Court's standing decisions of this Term demonstrate most clearly that the Court of Appeals erred in denying standing in the present case. Because of the

clear error committed by the Court of Appeals in this regard, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals should be summarily reversed.[2]

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[2] The trial court in its Judgment (Pet. App. p. 120, 121) mandated an adjustment *but only* mandated that adjustment as long as it could be performed in a "statistically defensible" manner.

Following that Judgment, the trial court issued an order defining activities and hearings that would permit the court to monitor the Bureau's effort to implement and carry out an adjustment and to permit both parties the opportunity through a series of hearings to establish whether such a "statistically defensible adjustment" was available and subject to final imposition. (Pet. App. p. 137-144).

Respondents in their Brief artfully marshall facts and arguments drawn in many respects from outside of the trial record in this case in an effort to convince this Court that any adjustment is impossible for the 1980 decennial census. The factual question of the scientific feasibility of an adjustment, of course, is not relevant to any of the issues presented in the petition. Nonetheless, the petitioners vigorously dispute the respondents' present position on the scientific feasibility of an adjustment. At the trial the position of the respondents, supported by the testimony of the Census Bureau's officials, did not dispute that an adjustment could be carried out if the Bureau were given a reasonable time to measure and adjust for the differential undercount beyond the statutory deadlines. The respondents' use of 1980 Census results only recently available as they relate to factual issues in this cause should appropriately be litigated on the record and before the District Court as a part of the implementation proceedings necessary to implement the District Court's judgment. It should also be noted that much of the materials relied upon by the respondents are the results and analysis of the 1980 census data that were simply not available to the District Court prior to the grant of a stay by Justice Stewart on December 24, 1980. (Pet. App. p. 147) That stay was granted before the very first census results were released on December 31, 1980.

CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari, the petition should be granted and the judgment of the Court of Appeals should be reversed.

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